Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

MICHAEL C., A MINOR BY HIS PARENT AND NEXT FRIEND, STEPHEN C.; STEPHEN C., INDIVIDUALLY, AND ON HIS OWN BEHALF, BOTH OF

Petitioner,

v.

THE RADNOR TOWNSHIP SCHOOL DISTRICT, PENNSYLVANIA DEPARTMENT OF EDUCATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Did the Third Circuit Court of Appeals err in finding that the actions of the defendants in unilaterally changing a disabled child's educational program and placement did not violate the pendency requirement of the Individuals With Disabilities Education Act at 20 U.S.C. Section 1415(j), and in denying tuition reimbursement to plaintiffs who independently obtained an appropriate educational program?

B. Did the Third Circuit Court of Appeals err in finding that a denial of pendency rights under IDEA to disabled students who transfer into a school district from out-of-state, rather than from within the state, is not violative of constitutional protections regarding the right to travel?

C. Did the Third Circuit Court of Appeals err in accepting a policy statement of the Department of Education which recognizes no pendency rights under IDEA to disabled children who transfer into a public school district from another state despite the lack of any congressional authority in IDEA for a distinction between in-state and out-of-state transfers?

D. Did the Third Circuit Court of Appeals err in refusing to find that Pennsylvania's special education standards, as incorporated into the federal entitlement under IDEA, provide greater protections concerning pendency than under the federal law?

TABLE OF CONTENTS

Questions Presented i

Table of Contents ii

Table of Citations iii

Opinions Below 1

Jurisdictional Statement 1

Constitutional Provisions 2

Concise Statement of the Case 2

Reasons for Granted the Writ 5

A. Introduction. 5

B. The Third Circuit Erroneously Relied Upon A Flawed Administrative Policy Statement Which Is Inconsistent With IDEA 8

C. Radnor's Actions Violated Michael's Family's Rights to Travel And To Equal Protection Of The Law 12

Conclusion 16

TABLE OF CITATIONS

Cases Cited:

Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995 (1972).....12

Honig v. Doe, 484 U.S. 305 (1988).....5,7,9,10,11

Lyons v. Town of Yarmouth, 18 IDELR 671 (D.C.ME 1992).....11

Maldonado v. Houstoun, 157 F.3d 179 (3d Cir.1998).....5,14,15

Saenz v. Brenda Roe, U.S. , 119 S.Ct. 1518 (1999).....5,12,13,14,15

Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322 (1969).....12,13

Zebley by Zebley v. Bowen, 855 F.d 67 (1988).....11

Statues

20 U.S.C.§ 1415(j).....i,2,5,8

20 U.S.C.§ 1401(8),1412(a)(1).....6

28 U.S.C.§ 1254(1).....2

APPENDIX

Appendix A - Sur Petition For Rehearing Of The United States Court of Appeals For The Third Circuit Dated February 11, 2000 ..... 1a

Appendix B - Judgment Of The United States Court Of Appeals For The Third Circuit Dated January 14, 2000 .... 4a

Appendix C - Opinion Of The United States Court Of Appeals For The Third Circuit Filed January 14, 2000 ..... 7a

Appendix D - Memorandum And Order Of The United States District Court For The Eastern District Of Pennsylvania Filed February 4, 1999 ..... 36a

Appendix E - Special Education Due Process Review Panel Commonwealth Of Pennsylvania Dated June 26, 1998 ..... 52a

Appendix F- Open Hearing Dated April 20, 1998 ..... 60a

The Petitioner, Michael C., respectfully prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Third Circuit, entered in the above entitled proceeding on February 11, 2000.

OPINIONS BELOW

The opinion and judgement of the Third Circuit Court of Appeals, dated January 14, 2000 was reported at 202 F.3d 642 (3rd Cir. 2000). A copy of the opinion is reproduced in the Appendix at p. 4a. The Order and Opinion of the United States District Court for the Eastern District of Pennsylvania, dated February 4, 1999 is unreported but can be located at 1999 WL 89675 (E.D.Pa Feb. 4, 1999). A copy of the opinion is reproduced in the Appendix at p. 36a. The unreported Opinion of the Pennsylvania Special Education Appeals Panels dated June 26, 1998 is reproduced in the Appendix at p. 52a. The Opinion of the Special Educator Hearing Officer dated April 30, 1998 is unreported and is reproduced in the Appendix at p. 60a.

JURISDICTIONAL STATEMENT

On January 14, 2000, the Third Circuit Court of Appeals entered judgement and opinion affirming the action of the United States District Court for the Eastern District of Pennsylvania which affirmed the judgement of a Pennsylvania Special Education Appeals Panel. A Petition for Rehearing En Banc was denied on February 11, 2000, by the Third Circuit Court of Appeals.

The jurisdiction of this Court to review the judgement of the Third Circuit Court of Appeals is invoked pursuant to 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS

20 U.S.C. §1415 (j)

Except as provided in subsection (k)(7), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with consent of the parents, be placed in the public school program until such proceedings have been completed.

CONCISE STATEMENT OF THE CASE

Michael is a seventeen (17) year old student with learning disabilities and severe hemophilia. Michael moved to the Radnor Township School District with his father from Washington, D.C. during the Summer of 1997. Prior to moving to Radnor, Michael attended the LAB School, a small private school for students with learning disabilities in Washington, D.C., pursuant to an Individualized Education Plan (IEP) which designated a private school placement with no integration with non-disabled peers. Michael attended the LAB School via this IEP by the Washington D.C. Public

Schools with public funding for three years prior to his move to Pennsylvania.

When Michael's family moved to Pennsylvania, Michael's father contacted the Radnor Township School District to obtain an appropriate program and IEP for Michael. On August 20, 1997, the school district convened what it described as "an IEP meeting" to develop an "interim program" for Michael for the 1997/98 school year. This IEP meeting was conducted despite the following facts: (1) Radnor's own evaluation of Michael had not yet been completed, (2) no representative of the LAB School or the Washington, D.C. public school was invited to attend the IEP meeting or was otherwise consulted, and (3) the District's Director of Pupil Services decided, before the evaluation was complete or the IEP meeting commenced, that Radnor would not support the pendant private school program, but would offer only an interim program in the Radnor Township High School in September, 1997. Each of these circumstances involved actions which are directly contrary to the Individuals With Disabilities Education Act (IDEA) or the federal/state regulations relating to IEP developments.

By letter dated August 26, 1997, the District offered two programs to Michael in Radnor's High School. Both of these programs were substantially different from Michael's pendent IEP and involved significant mainstreaming in the District's large (800 students) and less structured high school.

Michael's father rejected the Radnor Township program after careful consideration, and made the decision to place Michael at the nearby Hill Top School, a small school for children with disabilities located in Radnor Township in late

August, 1997. The testimony at the due process hearing established that the Hill Top placement, structure and program were very similar to Michael's pendent program at the LAB School. Both Hill Top and the Lab Schools are small, private schools which provide specialized, self-contained programs to students with significant learning disabilities. Their student populations, campus, and staff are nearly identical. The parties stipulated to the general appropriateness of Hill Top's program.

Michael's family was forced to relocate from Radnor to New Jersey in the Fall of 1997, and Michael remained at Hill Top for only 41 days. The requested reimbursement equaled $4299.31.

The state administrative due process proceeding was conducted before a hearing officer on April 30, 1998. On May 13, 1998, the hearing officer issued an Order which adopted a policy statement of the Office of Special Education Programs ("OSEP") of the United States Department of Education which would treat disabled students who transfer between school districts interstate differently than those who transfer intrastate. The plaintiffs filed a timely appeal to a Pennsylvania Special Education Appeals Panel, which also adopted the OSEP policy statement and affirmed the hearing officer on June 26, 1998.

On September 2, 1998, a Complaint was filed in United States District Court for the Eastern District of Pennsylvania, and the matter was assigned to Senior Judge Charles R. Weiner. The parties agreed that this matter could be decided on the administrative record without further evidence. On February 5, 1999, Senior Judge Weiner issued a Memorandum/Opinion and Order which also accepted the OSEP

memorandum and rejected plaintiff's right-to-travel claims; judgment was entered in favor of both defendants.

On January 14, 2000, the Third Circuit Court of Appeals entered judgement and opinion affirming the action of the United States District Court for the Eastern District of Pennsylvania. A timely petition for rehearing En Banc was then filed. On February 11, 2000, Third Circuit Court of Appeals denied the Petition for rehearing En Banc and a timely appeal to this Court filed.

REASONS FOR GRANTING THE WRIT

A. INTRODUCTION

This matter involves issues of national importance regarding the rights of children with disabilities who move between states under the Individuals With Disabilities Education Act. 20 U.S.C. Section 1415(j). The decision of the Third Circuit represents a serious and potentially devastating misinterpretation of the federal law concerning the rights of disabled children to remain in their current ("pendent") placement during disputes with school districts. The Third Circuit's decision is a significant departure from the leading Supreme Court decision on this issue. Honig v. Doe, 484 U.S. 305 (1988). Moreover, the Third Circuit's decision represents a dramatic redefinition of the right to interstate travel as recently delineated by the United States Supreme Court and this Court. Saenz v. Brenda Roe, ___ U.S. ___, 119 S.Ct. 1518 (1999); Maldonado v. Houstoun, 157 F.3d 179 (3d Cir. 1998).

The decision of the Third Circuit is particularly troubling because the Third Circuit explicitly recognized that its decision may lead to the result "that disabled students like Michael with comprehensive and long-standing IEP's can be forced upon an interstate move to somehow cope in regular education without supports while the District and the parent resolve any IEP dispute". Slip Opinion at 13 (emphasis in original). Under the Third Circuit's decision, severely disabled students like Michael who have comprehensive and long-standing IEP's--including children who are autistic, deaf, blind, multi-handicapped, profoundly mentally retarded, severely emotionally disturbed, and orthopedically disabled--will be forced into regular education without supports following an interstate move during any disagreement with the district, a process which can take months or even years. Incredibly, the Third Circuit suggests that parents who disagree with the school district's proposed special education program simply "place the child in a private school", Id. at 13-14, a comment which disregards the extraordinary cost of private school tuition in special education facilities. Unfortunately, these costs preclude this "option" for all but the most affluent families, a fact later described in the Court's opinion as the "unfortunate reality of the system Congress created". Id. at 14.

This is not the system to a free appropriate public education which Congress created. 20 U.S.C. Sections 1401(8); 1412(a)(1). As set forth below, the language of IDEA is clear, precise and unambiguous that disabled children with IEPs must remain in the last agreed-upon placement during proceedings with the District, and unilateral action by a

school district in changing the child's educational program and placement is flatly prohibited by IDEA. Honig

The Third Circuit also held, for the first time in the twenty-five year history of federal special education law, that the "proceedings" under the Act to which pendency applies involve only formal due process and judicial proceedings, and do not include the preliminary proceedings of the review of a student's IEP. This claim had been rejected by the District Court due to the simple fact that Section 1415 of the Act sets forth a variety of critical pre-due process "proceedings", including parental participation in the IEP and evaluation processes, and Section 1415(j) guarantees pendency during "any proceedings conducted pursuant to this Section". The result of the Third Circuit's enigmatic decision will be apparent to all who work in the field of special education--every family who moves between districts (either interstate or intrastate) and who wish to maintain the current educational program in the student's IEP (a very common occurrence) must immediately demand due process proceedings to enjoy the guarantee of pendency under the Act. This illogical and unnecessary result will be extremely costly and cumbersome to the special education system, as a hearing officer must immediately be assigned to each such request, a due process hearing scheduled, counsel retained, and evidentiary notices distributed; moreover, an immediate (and undesirable) adversarial relationship will be immediately created between the parties. With all due respect to the Third Circuit, it is unimaginable that Congress intended such a result when it enacted Section 1415(j).

B. The Third Circuit Erroneously Relied Upon A Flawed Administrative Policy Statement Which Is Inconsistent With IDEA.

The fundamental statutory question presented in this case is whether the defendants violated the pendency requirement of IDEA by denying a disabled student the last agreed-upon special education placement during administrative proceedings upon his move into Pennsylvania from another state. This statutory issue also implicates a separate, but fundamental, constitutional question involving the right to interstate travel. The statutory question will be addressed at the outset.

The requirement that a school district maintain a pendent placement on behalf of a student with disabilities is found at 20 U.S.C. Section 1415(j). This section provides, in relevant part, as follows:

> During the pendency of any proceedings conducted pursuant to this section, unless the state or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public

> school program until all such proceedings have been completed.

Incredibly, despite the Supreme Court's previous description of this precise language as "unequivocal", Honig, the Third Circuit found this language to be "at best ambiguous".

On December 6, 1995, the Office of Special Education Programs of the United States Department of Education issued Policy Memorandum 96-5 which dealt with interstate transfers of students with disabilities. It is upon this Memorandum that the Third Circuit relied. Incredibly, the OSEP memorandum neither cites nor quotes the statutory provision concerning pendency, but nonetheless proposes very different policies for interstate and intrastate transfers. Under OSEP's policy, disabled students who transfer interstate, but not intrastate, must be placed in full-time regular education without supports in the absence of parental agreement.

There is nothing in the plain language of the statute or the regulations which supports OSEP's enigmatic policy. The statute at Section 1415(j) is "unequivocal" and recognizes no "exception" of the type proposed by OSEP and accepted by the Third Circuit of this Court. See, Honig. As noted at the beginning of this petition, it takes little imagination to recognize that thoroughly absurd results can be created by this policy. Acceptance of this policy will provide school districts with incredible--and unprecedented--leverage to force families who move interstate to accept any inappropriate placement offered by the district rather than be forced into inappropriate regular education classes without supports--an

absurd result--which could be devastating to disabled children.

The United States Supreme Court clearly rejected another effort to rewrite the pendency provisions of IDEA in Honig. In Honig, a school district asked the court to create a "dangerousness exception" to the pendency requirement, and to allow school districts to unilaterally remove students which they perceived as "dangerous" from their current placement without judicial approval. In rejecting this claim, the Court noted that:

> The language of Section 1415(e)(8) is unequivocal. It states plainly that during the pendency of any proceedings initiated under the Act, unless the state or local educational agency and the parents or guardian of a disabled child otherwise agree, 'the child shall remain in the then current educational placement'. Section 1415(e)(8)(emphasis added). Faced with this clear directive, petitioner asks us to read a 'dangerousness" exception into the stay-put provision....[w]e

decline petitioner's invitation
to re-write the statute.[1]

While an administrative agency's interpretation of its own regulations may sometimes be afforded deference by the courts, such deference is inappropriate where, as here, the interpretation is contrary to the plain language of the statute. See, Zebley by Zebley v. Bowen, 855 F.2d 67 (1988).

Moreover, the apparent logic behind the OSEP policy memorandum, i.e., that various states may have different special education standards, is plainly inapposite to the facts at bar. In this case, Radnor offered no evidence that the District of Columbia's standards are, in any way, different from those in Pennsylvania. Indeed, Radnor's Director of Pupil Services testified that she was unaware of any difference between Pennsylvania and District of Columbia laws,

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[1] Inexplicitly, the Third Circuit does not address this critical language in Honig; nor does the Third Circuit discuss the only other reported decision on this issue, a case decided differently from the instant matter. Lyons v. Town of Yarmouth, 18 IDELR 671 (D.C.ME 1992).

regulations, policies, or procedures, and further testified that if Michael had transferred from a Pennsylvania school district, Radnor would have supported his placement at Hill Top.

C. Radnor's Actions Violated Michael's Family's Rights To Travel And To Equal Protection Of The Law.

The discriminatory treatment of Michael violates the constitutional mandate of equal protection and Michael's family's right to travel. Where a classification penalizes the exercise of the right to travel, the governmental action is strictly scrutinized to determine its constitutionality, and the state agency must establish a compelling justification for actions which penalize the right to travel. Saenz v. Brenda Roe, ___ U.S. ___, 119 S.Ct. 1518 (1999). Incredibly, the Third Circuit did not address the "penalization" component of Saenz; inasmuch as Radnor's key witness acknowledged that Radnor would have supported Hill Top if Michael had moved from within Pennsylvania, any assertion that Michael was not penalized by his interstate move is unsupportable.

This "strict scrutiny" test of Saenz is fulfilled only where "the state can demonstrate that such laws are necessary to promote a compelling government interest". Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995 (1972). Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322 (1969). Significantly, the Third Circuit did not even articulate the strict scrutiny test, much less find that it was satisfied.

The Saenz case clearly prohibits the type of discrimination in this case against a citizen who moves from one state to another. The Saenz court overturned a California law which, with the approval of the United States Department of Health and Human Services, limited new residents to reduced welfare benefits for the first year that they lived in the state of California. The court stated that "our cases have not identified any acceptable reason for qualifying the protection afforded by the [Constitution] for the citizen of State A who ventures into State B to settle there and establish a home. Permissible justifications for discrimination between residents and non-residents are simply inapplicable to a non-resident's exercise of the right to move into another state and become a resident of that state". (Some internal citations and punctuation omitted). The court further stated that "it is equally clear that the [Constitution] does not tolerate a hierarchy of...subclasses of similarly situated citizens based on a location of their prior residence". Moreover, "the states have not now, if they ever had, any power to restrict their citizenship to any classes or persons. A citizen of the United States has a perfect constitutional right to go to and reside in any state he chooses, and to claim citizenship therein, and an equality of rights with every other citizen".

Finally, and most significantly, the Saenz court adopted a strict standard of review in assessing cases of this type: "neither mere rationality or some intermediate standard of review should be used to judge the constitutionality of a state rule that discriminates against some of its citizens because they have been domiciled in that state for less than a year. The appropriate standard may be more categorical than that articulated in Shapiro, but it is surely no less strict".

Even prior to Saenz, this Court recognized the strict scrutiny standard in cases where state action penalized the exercise of the right to interstate travel. Maldonado v. Houstoun, 157 F.3d 179 (3d Cir. 1998), cert. denied 5/24/99, 1999 U.S. LEXIS 3454. The Court stated that "in deciding whether a durational residency requirement sufficiently impinges upon the right to travel or migrate to trigger strict scrutiny, the court looks to see whether the challenged law...penalizes the exercise of that right". (Some internal punctuation and citations omitted). In Maldonado, the court struck down Pennsylvania legislation that provided for twelve months of reduced benefits upon migration from another state. Finding that there was no question that this requirement penalized the right to travel, the court struck down the Pennsylvania legislation as a violation of the right to travel and equal protection.

There is no question that Michael and his family were penalized by the defendants for their exercise of the right to interstate travel. Indeed, Radnor's Director of Special Education readily acknowledged that if Michael had been a Pennsylvania resident who moved into the Radnor Township School District, the Hill Top program would have been honored and publicly funded. It would be difficult to imagine a clearer case of penalization for the exercise of the right to travel from one state to another. Therefore, under Saenz and Maldonado, the plaintiff was entitled to maintenance of the pendent placement in the same manner afforded to Pennsylvania's residents.

In this case, Radnor provided no justification--compelling, rational or otherwise--for its discrimination against Michael C. and his family. Radnor has not pointed to any distinction between the Washington D.C. and Pennsylvania statutes,

laws, or policies to justify this discrimination. Radnor acknowledges that if Michael transferred from a Pennsylvania school district, the placement selected by his family would have been respected and supported. Radnor also stipulated that Hill Top's educational program for Michael was almost entirely appropriate. Consequently, the District's actions violated the rights to travel and equal protection enjoyed by Michael and his family. Saenz, Maldonado.

CONCLUSION

The Petitioner requests review before this Court in order to decide an important question of federal law which has not been but should be settled by this Court regarding the pendency provision of the Individuals With Disabilities Education Act.

These issues are important in the administration of IDEA and have far reaching consequences for the children with disabilities.

The Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A – SUR PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED FEBRUARY 11, 2000

THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 99-1124

MICHAEL C., A MINOR BY HIS PARENT AND NEXT FRIEND, STEPHEN C; STEPHEN C.; INDIVIDUALLY AND ON HIS OWN BEHALF

V.

THE RADNOR TOWNSHIP SCHOOL DISTRICT; PENNSYLVANIA DEPARTMENT OF EDUCATION

Michael C.; Stephen C., Appellants

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Civ. No. 98-cv-04690)

SUR PETITION FOR REHEARING

BEFORE: BECKER, Chief Judge, SLOVITER, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, MCKEE, RENDELL, and ROSENN* Circuit Judges

The petition for rehearing filed by the Appellant in the above-entitled case, having been submitted to the judges who participated in the decision of the this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit Judges in regular active service not having voted for rehearing by this court in banc, the petition for hearing is hereby **DENIED**.

*Vote limited to panel rehearing only.

By the Court,

United States Circuit Judge

DATED:

APPENDIX B – JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JANUARY 14, 2000

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 99-1124

MICHAEL C., A MINOR BY HIS PARENT AND NEXT FRIEND, STEPHEN C.; STEPHEN C., INDIVIDUALLY, AND ON HIS OWN BEHALF, BOTH OF

V.

THE RADNOR TOWNSHIP SCHOOL DISTRICT; PENNSYLVANIA DEPARTMENT OF EDUCATION

Michael C.; Stephen C.,

Appellants

On Appeal From the United States District Court For the
Eastern District of Pennsylvania
(D.C. Civ. No. 98-cv-04690)
District Judge: Honorable Charles R. Weiner

Present: Nygaard, McKee, and Rosenn, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on November 2, 1999.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered February 5, 1999, be, and the same is hereby

affirmed. Costs taxed against appellants. All of the above in accordance with the opinion of the court.

ATTEST:

Clerk

Dated: 14 January 2000

APPENDIX C – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JANUARY 14, 2000

Filed January 14, 2000

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 99-1124

MICHAEL C., A MINOR BY HIS PARENT AND NEXT FRIEND, STEPHEN C.; STEPHEN C., INDIVIDUALLY, AND ON HIS OWN BEHALF

V.

THE RADNOR TOWNSHIP SCHOOL DISTRICT; PENNSYLVANIA DEPARTMENT OF EDUCATION

Michael C.; Stephen C.,

Appellants

On Appeal From the United States District Court For the Eastern District of Pennsylvania
(D.C. Civ. No. 98-cv-04690)

District Judge: Honorable Charles R. Weiner

Argued: November 2, 1999

Before: NYGAARD, MCKEE and ROSENN, Circuit *Judges.*

(Filed: January 14, 2000)

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OPINION OF THE COURT

ROSENN, *Circuit Judge.*

This appeal has its genesis in social legislation enacted by Congress designed to encourage states to provide meaningful education to individuals with disabilities. The specific question before us is whether the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, requires a Pennsylvania school district to provide a student with disabilities who relocates from another state with an

interim educational program identical to the program the student received in his or her prior state of residence. Michael C., a student with disabilities, attended a private school in Washington, D.C. under an Individualized Education Plan ("IEP") formulated by Washington educational authorities. Michael and his father moved from Washington to Radnor Township, Pennsylvania in the summer of 1997, and requested special educational treatment from the Radnor Township School District ("Radnor"). Radnor responded with specific educational proposals but Michael's father rejected them, and unilaterally placed Michael in a private school. Michael remained in this school for 41 days, after which his family again moved, this time to New Jersey.

Michael's father later initiated administrative proceedings seeking reimbursement for tuition costs incurred while Michael attended the private school in Pennsylvania. After unsuccessfully pursuing his administrative remedies, Michael's father filed this action in the United States District Court for the Eastern District of Pennsylvania against Radnor and the Pennsylvania Department of Education ("PDE"), seeking tuition reimbursement and claiming violations of the IDEA, 20 U.S.C. § 1415(j), the Rehabilitation Act, 29 U.S.C. § 794, and the Civil Rights Act of 1871, 42 U.S.C. § 1983. He also claimed that Michael's and his family's right to travel interstate under the Fourteenth Amendment to the United States Constitution had been violated. On cross-motions for summary judgment, the district court entered summary judgment in favor of Radnor and PDE as to all claims. The court also granted PDE's separate motion for dismissal of the § 1983 claim as to it based on Eleventh Amendment immunity. This timely appeal followed.[1] We will affirm.

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[1] As it did before the district court, Radnor Lakes issue with portions of the OSEP Policy Memorandum suggesting that where a

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The facts of this case are undisputed. Michael, 17 years old at the time events relevant to this case occurred, is learning disabled and suffers from severe hemophilia. Prior to August 1997, Michael and his father lived in Washington D.C. Pursuant to the IDEA, Washington public educational authorities had developed an IEP [2] for Michael.[3] This IEP

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disabled student with a functioning IEP in State A moves to State B, State B authorities should follow a procedure for interim assessment and program implementation prescribed therein. Although Radnor asserts that it satisfied OSEP's suggested procedures in this case, it contends that. OSEP lacks authority under IDEA to impose these affirmative requirements on school districts. It is unnecessary for us to reach this issue, however (see Op. at. 6 n.7. Radnor Br. at 18-19), and we express no opinion on these portions of' OSEP's memorandum. Rather, our analysis is restricted to the memorandum's conclusion that one state need not adopt and implement an IEP developed by another state.

[2] As it did before the district court, Radnor Lakes issue with portions of the OSEP Policy Memorandum suggesting that where a disabled student with a functioning IEP in State A moves to State B, State B authorities should follow a procedure for interim assessment and program implementation prescribed therein. Although Radnor asserts that it satisfied OSEP's suggested procedures in this case, it contends that. OSEP lacks authority under IDEA to impose these affirmative requirements on school districts. It is unnecessary for us to reach this issue, however (see Op. at. 6 n.7. Radnor Br. at 18-19), and we express no opinion on these portions of' OSEP's memorandum. Rather, our analysis is re-

recommended placement at a "public/private separate school." (A. 185a). Accordingly, Michael attended a small private school for learning disabled students called the LAB School. The LAB School served only students with disabilities, and therefore its students were segregated from their non-disabled peers. Michael attended the LAB School for three years.

When Michael and his father moved to Pennsylvania in 1997, the father contacted Radnor educational authorities to obtain appropriate placement for Michael. Radnor convened an "IEP meeting" to develop an interim program for Michael for the 1997-98 school year. At this time, Radnor had not yet completed its own evaluation of Michael's educational needs.

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stricted to the memorandum's conclusion that one state need not adopt and implement an IEP developed by another state.

3 As it did before the district court, Radnor Lakes issue with portions of the OSEP Policy Memorandum suggesting that where a disabled student with a functioning IEP in State A moves to State B, State B authorities should follow a procedure for interim assessment and program implementation prescribed therein. Although Radnor asserts that it satisfied OSEP's suggested procedures in this case, it contends that. OSEP lacks authority under IDEA to impose these affirmative requirements on school districts. It is unnecessary for us to reach this issue, however (see Op. at. 6 n.7. Radnor Br. at 18-19), and we express no opinion on these portions of OSEP's memorandum. Rather, our analysis is restricted to the memorandum's conclusion that one state need not adopt and implement an IEP developed by another state.

By letter dated August 26, 1997, Radnor offered Michael two interim programming options pending completion of its own evaluation of Michael's needs. Both of these options placed Michael at Radnor High School ("Radnor High"), a large public high school with a total enrollment of approximately 800 students, where Radnor believed it could effectively implement the substance of Michael's Washington IEP. The first option, which Radnor characterizes as the "learning support" or "LS" option. involved enrolling Michael in mainstream English, science, social studies and elective classes, and in special education mathematics and written expression classes. This option also involved provision of support for homework and test preparation, and the development of study skills through a special education resource program. The second option, which Radnor characterizes as the "emotional support" or "ES" option, involve enrolling Michael in an "Emotional Support Program" for English, science, social studies, health and physical education classes, in "learning support" for mathematics, and in mainstream elective courses.

Michael's father rejected these options, and unilaterally decided to place Michael at the Hill Top School, a small private school for children with disabilities. In the fall of 1997, before Radnor had completed Michael's evaluation, Michael and his father again relocated, this time to New Jersey, for reasons related to the father's job. Michael had attended Hill Top for 41 days, during which time his father incurred tuition expenses in the amount of $4299.31. Because Michael left Pennsylvania before Radnor officials had completed their own evaluation of Michael's educational needs, Radnor never developed its own IEP for Michael.

In January 1998, after moving to New Jersey, Michael's father initiated a due process hearing in Pennsylvania as provided for by the IDEA, 20 U.S.C. § 1415(f). The purpose of

this hearing was to determine whether the IDEA required Radnor to reimburse the father for the cost of Michael's Hill Top tuition. Both the local hearing officer and later the Pennsylvania Special Education Appeals Panel rejected the father's request. Both relied on a policy memorandum of the United States Department of Education's Office of Special Education Programs ("OSEP") stating that when a disabled student moves from one state to another, the new state of residence is not required to adopt and implement the most recent IEP developed for the student by the previous state of residence.

The plaintiffs then instituted the present action against Radnor and PDE. PDE moved to dismiss their § 1983 claim against it based on the Eleventh Amendment. In addition, the parties agreed that all claims could be decided on the administrative record without further evidence, and cross-moved for summary judgment. On February 5, 1999, the district court granted PDE's motion to dismiss the § 1983 claim as to it, and also granted the defendants' motion for summary judgment as to all claims and denied the plaintiffs' cross-motion, relying heavily on the OSEP policy memorandum.

II

Although plaintiffs, Michael C. and his father, claimed numerous statutory violations and one constitutional violation in the district court, on appeal they seek relief on only two of these grounds. First, they contend that the IDEA's "pendency" or "stay-put" provision, 20 U.S.C. § 1415(j), required Radnor to implement Michael's Washington IEP. Second, plaintiffs argue that Radnor's refusal to implement Michael's Washington IEP violated his and his family's, constitutional right to interstate travel. We exercise plenary review over the district court's order granting summary judgment in favor of the defendants. See *W.B. v. Matula*, 67

F.3d 484, 493 (3d Cir. 1995). The material facts being undisputed, we therefore address plaintiffs' arguments that they, and not the defendants, are entitled to judgment as a matter of law. *See* Fed. R. Civ: P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-52 (1986).

A. Whether the IDEA Required Radnor to Implement Michael's Washington IEP

In enacting the IDEA, Congress made known its strong preference for integrating students with disabilities into regular classrooms, and against segregating such students from their non-disabled peers unless absolutely necessary to provide them with an educational benefit. See 20 U.S.C. § 1412(a)(5)(A); *Honig v. Doe,* 484 U.S. 305, 311 (1988); Oberti *v. Board of Educ. of Borough of Clernenton Sch. Dist.,* 995 F.2d 1204, 1213-14 (3d Cir. 1993). Nevertheless, cases presenting the reverse situation occasionally arise, where the complaint is the school district's failure to segregate a child from his or her non-disabled peers by placing that child in a learning environment serving only disabled students. This is such a case.

The plaintiffs contend that the defendants' refusal to adopt Michael's Washington IEP and to implement that IEP by placing him in the segregated Hill Top school, as opposed to a more integrated learning program at Radnor High, violated the IDEA's "pendency" or "stay-put" provision. This provision, found at 20 U.S.C. § 1415(j), states in pertinent. part:

> . . . . [D]uring the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then- current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public
> school program until all such proceedings have been completed.[4]

Plaintiffs argue that when Michael moved to Radnor Township, the UAB School in Washington was Michael's "then-current educational placement," and Radnor educational authorities' process of evaluating his educational needs constituted pending proceedings. Accordingly, plaintiffs contend that Radnor was obligated during this time to implement Michael's Washington IEP, and that this required placing him at Hill Top, a private school, which they assert provided the educational program most similar to the one Michael received at the LAB School.

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[4] As it did before the district court, Radnor Lakes issue with portions of the OSEP Policy Memorandum suggesting that where a disabled student with a functioning IEP in State A moves to State B, State B authorities should follow a procedure for interim assessment and program implementation prescribed therein. Although Radnor asserts that it satisfied OSEP's suggested procedures in this case, it contends that. OSEP lacks authority under IDEA to impose these affirmative requirements on school districts. It is unnecessary for us to reach this issue, however (see Op. at. 6 n.7. Radnor Br. at 18-19), and we express no opinion on these portions of' OSEP's memorandum. Rather, our analysis is restricted to the memorandum's conclusion that one state need not adopt and implement an IEP developed by another state.

The district court agreed with the local hearing officer, the state appeals board, and the defendants that the IDEA is silent on how to apply the pendency provision when a student transfers from another state. It therefore accorded deference to the federal OSEP Policy Memorandum 96-5. That memorandum states in pertinent part:

> [E]ntitlement to a [free appropriate public education, or] FAPE, by its terms, encompasses an appropriate educational program that is individually-designed for each student in accordance with the requirements of Part B [of IDEA] and the educational standards of the State in which the student's parents reside. In addition, under 34 C.F.R. § 300.600, each State must exercise a general supervision over all programs in the State that provide educational services to disabled students, and must ensure that all such programs meet State education standards and Part B requirements.
>
> When a student moves from a school district in State A to a school district in State B, the State B school district first must ascertain whether it will adopt the most recent evaluation and IEP developed for the student by the State A school district. Since the State A school district's evaluation and IEP were based in part on the educational standards and eligibility requirements of State A, the student's evaluation and IEP developed by the State A school district might not necessarily be consistent with the educational standards of State B. Therefore, the State B school district must determine, as an initial matter, whether it believes that the student has a disability and whether the most recent evaluation of the student conducted by the school district in State A and the State A school district's IEP meet the requirements of Part B and well as the educational standards of State B.

OSEP Policy Memorandum 96-5, *reprinted* in 24 Indiv. Disabil. Educ. L. Rptr. 320 (U.S. Dep't Educ. Dec. 6, 1995). The district court therefore held that the pendency provision did not require implementation of Michael's Washington IEP.

On appeal, plaintiffs make two arguments. First, they contend that the OSEP Policy Memorandum is not entitled to deference because the plain language of the pendency provision and federal judicial and administrative decisions interpreting this provision dictate a contrary result. Second, they argue that regardless of the interpretation given the IDEA's pendency provision, Pennsylvania regulations, which the IDEA incorporates into its scheme, contain a broader pendency requirement, and the Pennsylvania pendency regulation dictates a contrary result. Radnor and PDE dispute these arguments, and in addition contend that because no "proceedings" under section 1415 were pending while Michael resided in Radnor Township, the stay-put provision is inapplicable. We address these arguments in order.

1. Application of the IDEA's Stay-Put Provision

In interpreting a congressional enactment, a court must first determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'" *Deane v. Pocono Med.* Ctr., 142 F.3d 138, 146 (3d Cir. 1998) (en banc) (quoting Robinson *v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson*, 519 U.S. at 340. The IDEA is silent on how its pendency provision is to be applied to students who transfer interstate versus students who transfer intrastate, and the plain language of the pendency provision is at best ambiguous with respect to this issue. On its face, it is not clear that

Congress intended the requirement that a student remain in his or her "then-current educational placement" to apply to students who relocate from one state to another. For example, a student's prior placement no longer seems "current" after he or she withdraws from that placement and moves away. Moreover, it is impossible for the student's new school district in Pennsylvania to keep the student in his or her previous school as required by the stay put" provision where that school is in another state. Therefore, we must look beyond the isolated text of section 1415(j) for guidance on how to apply this provision in this case. *See, e.g., United States v. Balascsak,* 873 F.2d 673, 679 (3d Cir. 1989).

OSEP is the agency charged with principal responsibility for administering the IDEA. 20 U.S.C. § 1402(a). The portion of OSEP Policy Memorandum 96-5 relevant to this case is properly characterized as an interpretive rule because it imposes no substantive obligations, but rather clarifies that the IDEA's pendency provision does not apply to situations where a student moves from one state to another. *See Bailey v. Sullivan*, 885 F.2d 52, 62 (3d Cir. 1989) (en banc).[5]

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5 As it did before the district court, Radnor Lakes issue with portions of the OSEP Policy Memorandum suggesting that where a disabled student with a functioning IEP in State A moves to State B, State B authorities should follow a procedure for interim assessment and program implementation prescribed therein. Although Radnor asserts that it satisfied OSEP's suggested procedures in this case, it contends that. OSEP lacks authority under IDEA to impose these affirmative requirements on school districts. It is unnecessary for us to reach this issue, however (see Op. at. 6 n.7. Radnor Br. at 18-19), and we express no opinion on these portions of OSEP's memorandum. Rather, our analysis is re-

The district court deferred to OSEP Policy Memorandum 96-5, citing *Chevron, U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984). This court has held that the level of deference to be accorded such interpretive rules depends upon their persuasiveness. "Admittedly, [they] do not rise to the level of a regulation and do not have the effect of law. A court is not required to give effect to an administrative interpretation .... Instead, the level of deference given to an interpretive bulletin is governed by the bulletin's persuasiveness." *Brooks v. Village of Ridgefield Park*, 185 F.3d 130, 135 (3d Cir. 1999) (citations omitted). *See Elizabeth Blackwell Health Center for Women v. Knoll*, 61 F.3d 170, 182 (3d Cir. 1995) (deferring to HHS directive interpreting Hyde Amendment restricting use of Medicaid funds to fund abortions, and holding that HHS interpretation preempted Pennsylvania law), cert. denied, 516 U.S. 1093 (1996); *see also Honig*, 484 U.S. at 325 n.8 (according deference to OSEP policy letter setting forth agency's interpretation of phrase "change in placement" in IDEA's predecessor statute).

The conclusion expressed in OSEP Policy Memorandum 96-5 that one state need not automatically accept and implement an IEP developed by another state does not appear to conflict with any previous or subsequent position taken by that agency. As we now discuss in greater detail, because this aspect of the policy memorandum is well- reasoned and persuasive in that it comports with the IDEA's statutory and regulatory scheme and with precedent interpreting that

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stricted to the memorandum's conclusion that one state need not adopt and implement an IEP developed by another state.

scheme, we are persuaded that the district court did not err in its thoughtful analysis and conclusion to defer to the memorandum.

There are strong reasons for that deference and the result reached by the district court. The IDEA recognizes that education is traditionally a state function. Accordingly, it leaves the responsibility of providing a free appropriate public education, or "FAPE," to students with disabilities to state and

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[6] Citing to 20 U.S.C. § 1407(f), plaintiffs argue that the 1997 IDEA amendments make clear that OSEP's policy statements are not entitled to the force of law. Presumably, plaintiffs intended to cite to § 1406(f), which states that where the Secretary responds to an inquiry regarding a policy, question, or interpretation under Part B of the IDEA, that response "shall include an explanation that the written response-

> (1) is provided as informal guidance and is not legally binding; and
>
> (2) represents an interpretation by the Department of Education of the applicable statutory or regulatory requirements in the context of the specific facts presented."

Assuming that Policy Memorandum 96-5 is the type of response referred to by this provision, section 1406(f) merely imposes a requirement that the DOE response put readers on notice that it is not legally binding. This requirement, which was not effective when OSEP published Policy Memorandum 96-5, does not prevent us from considering DOE policy statements to be persuasive and therefore worthy of deference.

local educational authorities. See 20 U.S.C. § 1400(c)(6) (1998); 20 U.S.C. § 1400(b)(8) (1996); 34 C.F.R. §§ 300.13, 300.600 (1999). Provision of a FAPE requires that special education and related services must "meet the standards of the State educational agency," and must "include an appropriate preschool, elementary, or secondary school education in the State involved." 20 U.S.C. § 1401(8) (1998); 20 U.S.C. § 1401(18) (1996). Under current section 1412, States are eligible for federal financial assistance only when the state demonstrates that it "has in effect policies and procedures to ensure that it meets" the conditions imposed, including that it makes available a FAPE to children with disabilities residing in that state. 20 U.S.C. § 1412(a) (1998). A local educational authority is eligible to receive these federal funds only if it "has in effect policies, procedures, and programs that are consistent with the State policies and procedures established under section 1412." 20 U.S.C. § 1413 (1998).

Because Congress left primary responsibility for providing a FAPE and for implementing the IDEA to the states, we believe it unlikely that Congress intended the stay-put provision, which dates back to 1975 and the IDEA's predecessor statute, to impose a requirement on states that they must implement an IEP established in another state without considering how consistent that IEP is with the policies and mandates of the student's new residential state.

Precedent interpreting the IDEA's pendency requirement supports this interpretation. As the parties observe, the stay-put provision was intended to serve as a type of "automatic preliminary injunction" preventing local educational authorities from unilaterally changing a student's existing educational program. *See Drinker v.* Colonial *School Dist.,*

78 F.3d 859, 864 (3d Cir. 1996). Where the student's existing IEP calls for public school placement with educational supports to compensate for the child's disability, the stay-put provision may require that *local educational authorities* not unilaterally attempt to alter the IEP by placing the child in segregated, non-regular education classes. *See. e.g., Honig*, 484 U.S. at 323-28; *Oberti*, 995 F.2d at 1220-24. Conversely, where the student's existing IEP requires placement in a private school, the stay-put provision may require that local authorities not unilaterally attempt to alter the IEP by placing the student in a public, regular education classes. *See Drinker*, 78 F.3d at 867; *Jarczynski v. St. Mary's County Pub. Sch.*, 29 Indiv. Disabil. Educ. L. Rep. 49 (D. Md. Oct. 13, 1998).

However, where a *parent* unilaterally removes a child from an existing placement determined in accordance with state procedures. and puts the child in a different placement that was riot assigned through proper state procedures, the protections of the stay-put provision are inoperative until the state or local educational authorities and the parents agree on a new placement. *See Susquenita Sch. Dist. v. Ruelee S.*, 96 F.3d 78, 83 (3d Cir. 1996).[7] Only once state authorities and

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[7] We note that this scenario is distinguishable from the situation in which a parent unilaterally removes a child previously determined to be disabled from one school district and moves the child to another school district *in the same state*. In the latter situation, the child's educational placement has already been determined in accordance with state procedures and with the consent of the child's parents, and his or her IEP bears the imprimatur of that state. *See Inquiry of Rieser*, OSEP Policy Letter, July 17, 1986 (U.S. Dep't Educ. 1986).

parents have reached such agreement does a "then-current. educational placement" come into existence. *Id.* In the instant case, it is Michael's father who unilaterally removed Michael from the LAB School when he moved the family to Radnor Township. Neither Washington educational authorities nor Pennsylvania authorities played any role in this decision. The plaintiffs now claim that upon moving to Pennsylvania, Radnor should have placed Michael at the Hill Top School rather than at Radnor High. However, his father never reached any agreement with Radnor or with other Pennsylvania educational authorities that Michael should be placed in a segregated, private school. Therefore, Michael had no "then-current educational placement" in the Commonwealth of Pennsylvania, and the stay-put provision provides no relief for him.

We hold that the IDEA's overall scheme and the precedent interpreting that scheme leads inexorably to the conclusion that when a student moves from State A to State B, any prior IEP in effect in State A need not be treated by State B as continuing automatically in effect. This interpretation of the inapplicability of the stay-put provision may, as plaintiffs claim, lead to the initial result that "disabled students like Michael with comprehensive and long-standing IEP's . . can be forced upon an interstate move to somehow cope in regular education *without supports* while the district and the parent resolve any IEP dispute." (Appellant's Br. at 14 (emphasis in original)). But if parents believe that private school placement remains the only way to provide the student with the educational benefit required by the IDEA, or otherwise disagree with an IEP proposal, they can place the child in a private school, initiate a due process hearing, and seek reim-

bursement from educational authorities later.[8] *See Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993); *School Comm. of Town of Burlington, Mass. v. Department of Educ. of Commonwealth of Mass.*, 471 U.S. 359, 369-73 (1985). Of course, they act at their own financial risk, and will recover only if they are correct that local authorities have failed to provide the educational program to which their child is entitled under the IDEA. *Burlington*, 471 U.S. at 373-74. The plaintiffs' contention that these parents would have to keep paying private school tuition out of pocket for "years" is meritless, as federal and state regulations impose strict timing requirements on the completion of evaluations, the development and implementation of IEPs, and review of challenges to a local educational authority's proposal or refusal to initiate or change the identification, evaluation, or educational placement of a child or the provision of FAPE to a child. *See* 34 C.F.R §§ 300.504(a), 300.512; 22 Pa. Code §§ 14.25(m), 342.25(p) (timeline for completion of multidisciplinary evaluations); 22 Pa. Code. §14.32(i) (timeline for preparation and implementation of IEPs); 22 Pa. Code §§ 14.63, 14.64(o) (timelines for requesting and holding prehearing conference or due process hearing). We are mindful that this interpretation may bind the hands of parents who

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[8] Because Pennsylvania never established an IEP for Michael, it is not certain that Radnor's interim educational plan for Michael was inappropriate. The administrative hearing officer concluded that the interim options proposed by Radnor would have closely approximated the placement Michael received at the LAB School. The district court found that this conclusion was supported by substantial evidence on the record as a whole (Op. at 8 n. 10), and plaintiffs have not appealed this determination.

cannot afford to pay private school tuition out- of-pocket and await future reimbursement. This same result, however, can occur where parents of a student who transfers intrastate disagree with the new school district's placement of their child, and appears to be an unfortunate reality of the system Congress created.

Accordingly, we hold that the interpretation adopted by OSEP in Policy Memorandum 96-5 is a reasonable accommodation of the stay put provision and the overriding purposes and structure of the IDEA, and we are persuaded that. this interpretation deserves deference.[9]

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[9] We note that an additional reason for adopting OSEP's interpretation of the stay-put provision, not asserted by the parties, may lie in the limited congressional authority under which the provision was originally enacted. The stay-put provision dates back to 1975, when it was enacted as section 615(e)(3) of the IDEA's predecessor statute. The Education for All Handicapped Children Act. See Pub. L. No. 94-142, 1975 U.S.C.C.A.N. (89 Stat.) 773, 789. Congressional authority for passage of this statute derived from its spending power, U.S. Const. art. 1. § 8, and that act functioned by conditioning state and local educational authorities' eligibility for federal funds upon their satisfaction of certain conditions favorable to education of disabled students. *See Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley,* 458 U.S. 176, 204 n.26 (1982). The Supreme Court has stated that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Id.* (quoting *Pennhurst State School v. Haldennan*, 451 U.S. 1, 17 (1981)).

However, we note one wrinkle in this analysis. The 1997 amendments to the IDEA altered the statute's "findings" provision to in-

2. Pennsylvania's Regulatory Pendency Requirement

Nevertheless, even though the IDEA's stay-put provision does not provide a basis for relief, "[f]ederal law incorporates state standards, and a school district may violate the IDEA if it fails to satisfy the more stringent state law requirements." *Firth v. Galeton Area Sch. Dist.*, 900 F. Supp. 706, 712 n.9 (M.D. Pa. 1995) (citing *Doe v. Board of Educ. of Tullahoma City Sch.*, 9 F.3d 455, 457 (6th Cir. 1993) (per curiam), *cert. denied*, 511 U.S. 1108 (1994)); *see also Board of Educ. of East Windsor Regional Sch. Dist. v. Diamond*, 808 F.2d 987, 992 (3d Cir. 1986). The plaintiffs argue that a Pennsylvania regulation imposes a more stringent pendency requirement than that imposed by IDEA itself or by DOE regulations. The regulation in question states:

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clude language invoking the Equal Protection Clause of the Fourteenth Amendment. See 18 U.S.C. § 1400(c)(6)-(10). This addition of the Fourteenth Amendment as a constitutional basis for passage of the 1997 IDEA amendments may undercut this spending power argument. Nevertheless, after the 1997 amendments, the stay-put provision remained substantially identical to its previous text, was placed in "Part B" (subchapter II) of the amended statute, which is entitled "Assistance for Education of All Children with Disabilities," Pub L. No. 105-17, 1997 U.S.C.C.A.N. (111 Stat.) 37, 49, and continued to appear in 20 U.S.C. § 1415, subpart (a) of which explicitly states that the procedures established by that section are conditions imposed upon "[A]ny State educational agency, State agency, or local educational agency that receives assistance under this subchapter."

Regardless, the parties have not raised or briefed this argument, and we do not rely on it in deciding this appeal.

> No change in the identification, evaluation, educational placement or IEP of an exceptional student or an eligible young child may be made during the pendency of an administrative or judicial proceeding unless agreed upon by the parties to the proceeding.

22 Pa. Code §, 14.61(b)

The plaintiffs contend that this regulation's prohibition on changes in a child's "identification, evaluation, educational placement, or IEP" is broader than the federal prohibition on changes in a child's "then-current educational placement," and that this broader sweep includes evaluations and IEP's from other states. One federal district court has noted in dictum that the Pennsylvania regulation is "much more prohibitive than its federal counterpart" in that § 14.64(b) prohibits re- evaluation during the pendency of proceedings, whereas the federal stay-put provision only prohibits a change in educational placement. *See Delaware County Intermediate Unit # 25 v. Martin & Melinda K.*, 831 F. Supp. 1206, 1223 n.25 (E.D. Pa. 1993). However, two other federal courts, including this court, have noted that the requirements of § 14.64(b) "track" the federal standard. *See Drinker*, 78 F.3d at 864 n. 11; *Matthew K. v. Parkland Sch. Dist.*, No. Civ. A. 97-6636, 1998 WL 84009, at *5 n.6 (E.D. Pa. Feb. 26, 1998).

The district court rejected Michael's contention, holding that "the Pennsylvania regulations are silent on accepting out of state IEP's." (Op. at 7 n.8). We believe the district court was right to do so for two reasons. First, Pennsylvania regulations contain a provision expressly requiring that:

> If an exceptional student moves from one school district in this Commonwealth to another, the new district shall implement the existing IEP to the extent possible or shall provide the services and programs specified in an interim

> IEP agreed to by the parents until a new IEP is developed and implemented in accordance with this [and other] sections[ ] . . . and until the completion of due process proceedings . . . .

22 Pa. Code. § 14.31(c). The existence of this specific regulatory provision is significant because a parallel provision dealing with students who move from another state to a school district in Pennsylvania, and who had previously been educated in accordance with an IEP developed in that other state, is conspicuously absent from these regulations. This absence evidences a lack of intent on the part of Pennsylvania regulators to address Michael's situation.

Second, the Pennsylvania appeals panel, the highest administrative authority of the Commonwealth to opine in this case, concluded that because the federal pendency provision did not apply, once plaintiffs rejected Radnor's interim IEP offer, "Michael was considered a regular education student." (A.119a). Presumably, had this state administrative panel construed Pennsylvania regulations to mandate implementation of the Washington IEP, it would have so held in its analysis.[10]

Accordingly, we hold that Pennsylvania regulations do not require a Pennsylvania school district such as Radnor to implement the IEP formulated in another state.

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[10] In addition, the local hearing officer directly rejected plaintiffs' argument, finding that Pennsylvania's regulations are merely "clarifications of how to implement the federal IDEA requirements within Pennsylvania." (A.127a-28a)

3. "Proceedings"

In addition, even if we did interpret the IDEA's stay-put provision to require a state to implement an IEP developed by another state, this provision is not applicable in this case because by its terms, it applies only to attempts to alter a student's current educational placement "during the pendency of any proceedings conducted pursuant to *this section*." 20 U.S.C. § 1415(j) (emphasis added). (*See* Radnor Br. at 9; PDE Br. at 14). Radnor and PDE contend that the earliest proceeding that can be conducted pursuant to section 1415 is a due process hearing (conducted pursuant to section 1415(j), and that since Michael had already moved to New Jersey when he requested a due process hearing, no proceeding "conducted pursuant to" section 1415 was pending at the time he resided in Radnor Township.

The district court rejected this argument, holding that proceedings under section 1415 included "the opportunity of the parent or guardian to inspect relevant records with respect to the child's evaluation, and the notice requirement the school district must satisfy when making the initial placement decision," both of which had begun while Michael lived in Radnor Township. (Op. at 4 n.4). The district court characterized these as "proceedings set forth in § 1415(b)," and noted that both "are part of the process by which a school district changes a student's placement, but by definition occur before the start of a due process hearing."

In this respect, the district court was mistaken. The types of proceedings dealt with in section 1415(b), which include the conduct and development of evaluations, eligibility determinations, IEP's, and educational placement, arise under section 1414. Section 1415(b) merely sets forth "procedures" to be observed during these "proceedings." Therefore, no proceedings conducted pursuant to section 1415 were pending during the time Radnor offered to place Michael in

Radnor High and his father instead placed him at Hill Top."
See Verhoeven v. Brunswick Sch. Comm., __*F.3d*__ No. 98-2348, 1999 WL 721698, at *5 (1st Cir. Sept.,21, 1999) (stay-put provision applies during pendency of "administrative and judicial proceedings challenging a placement decision"); *Kari H. v. Franklin Special Sch. Dist.*, Nos. 96-5066 and 96-5178. 1997 WL 468326, at, *6 (6th Cir. Aug. 12 1997) (per curiam) (only three types of proceedings arise tinder section 1415 - due process hearings, state administrative review, and civil judicial review actions in state or federal court)."

Because we conclude that neither the stay-put provision nor Pennsylvania regulations required Radnor to implement Michael's Washington IEP, and that no proceedings were pending in Pennsylvania while Michael resided there, we

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11 We do not address whether the mediation procedures codified at section 1415(e) by the 1997 IDEA amendments qualify as "proceedings conducted pursuant to" section 1415 under the pendency requirement.

12. *See also Drinker*, 78 F.3d at 863-64 (nothing that stay-put provision applies during impartial due process hearing on parents' complaints regarding educational placement of handicapped children, and during state or federal judicial review of final administrative proceedings, without comment about provision's application to earlier proceedings involving local educational authorities), *Mrs. C. v. Wheaton*, 916 F.2d 69, 72 (2d Cir. 1990) (implying that pending "proceedings" means due process proceedings under section 1415); *Smith v. Roher*, Civ. A. No. 89-3258, 1991 WL 132545, at *1 (D.D.C. July 10, 1991) (stay-put, provision applies once process of administrative review of placement decision is commenced and remains in effect through completion of civil action in district court).

therefore hold that plaintiffs' claim for reimbursement under the IDEA must fail.[13]

B. Michael's Constitutional Right to Travel

The plaintiffs also contend that Radnor's failure to implement Michael's Washington IEP violated their Fourteenth Amendment right to travel interstate by denying Michael benefits that would be afforded to a disabled student who transferred intrastate, from one Pennsylvania school district to another. We disagree. [14]

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[13] Although it does not appear that plaintiffs have appealed their claim under the Rehabilitation Act, 29 U.S.C. § 794, we note that the district court correctly concluded that this claim is derivative of their IDEA claim (Op. at 9), and therefore this claim too must fail.

[14] In addition to granting summary judgment in favor of both defendants on this claim, the district court also dismissed plaintiffs' § 1983 claim as to PDE based on that defendant's Eleventh Amendment immunity. (Op. at 2 n.3). T11c plaintiffs have not argued that this decision was erroneous, and we therefore do not. consider that ruling presented for our review. Accordingly, we discuss the plaintiffs' § 1983 claim as against Radnor only. Moreover, we do not address PDE's additional argument that Michael has not adequately alleged that any PDE official was involved in the decision not to honor his Washington, D.C. IEP.

The Court has described the constitutional right to travel as embracing at least three components: (1) the right of a citizen of one state to enter and leave another state; (2) the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second state; and (3) for those travelers who elect to become permanent residents, the right to be treated like citizens of that state. *See Saenz v. Roe,* 119 S. Ct. 1518, 1525 (1999). The plaintiffs contend that the last of these components is violated by Radnor's refusal to honor Michael's Washington IEP. They base this assertion on the testimony of Radnor's Director of Special Education that, had Michael been a Pennsylvania resident who merely moved from another Pennsylvania school district to Radnor, an IEP calling for private placement would have been honored. (A.154a).

Adoption of the policy enunciated in OSEP Policy Memorandum 96-5, however, does not cause Michael to be treated differently from other Pennsylvania residents. Every student in Pennsylvania identified as disabled is entitled to an evaluation, an IEP, and if warranted, a special placement, in accordance with Pennsylvania procedures. Had Michael been a Pennsylvania resident transferring to Radnor from another Pennsylvania district, where he had already been identified as disabled and was being educated in accordance with an IEP developed there, he would have already submitted to these procedures. The District Director of Special Education's testimony that Radnor would have honored an IEP developed under such circumstances flows logically from this view and in no way affects plaintiffs' right to travel interstate.

Michael transferred from Washington, and had not yet undergone an evaluation in accordance with Pennsylvania

procedures, as every other disabled student enrolled in Pennsylvania had. Therefore, in requiring that a new IEP be developed, Radnor's treatment of Michael was not inconsistent with its treatment of Pennsylvania residents. Indeed, only by submitting to these procedures could Pennsylvania determine if Michael even had a right (under the IDEA) to a private placement. Pennsylvania decided that, at least on an interim basis, Michael had no such right, and his educational needs could instead be met in a structured public school placement. We need not pass on the merits of that decision. *See supra* note 8.

Arguably, requiring a disabled student who has undergone evaluation and IEP development in a different state to submit to this process a second time upon moving to a new state possibly may deter the student and his family from moving to the new state. However, an otherwise constitutional law that incidentally discourages migration is not necessarily rendered suspect or invalid merely because of such incidental effect. *See* Lawrence H. Tribe, *American Constitutional Law* § 15-14, at 1381 (2d ed. 1988).

Michael has a right, established by the IDEA and defined by state law, to a free, appropriate public education. Radnor has done nothing to alter or deny Michael that right. It has not imposed different standards on the type of education Michael may receive versus the type of education a disabled student who moves from one school district to another within Pennsylvania may receive. Thus, Michael cannot claim that Radnor's action in this case violated his right to travel under the Equal Protection Clause of the Fourteenth Amendment, and consequently, cannot claim a violation of 42 U.S.C. § 1983.

III.

For the foregoing reasons, the order of the district court granting summary judgment in favor of the defendants and denying summary judgment for the plaintiffs will be affirmed.

A True Copy:
Teste:
Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX D – MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED FEBRUARY 4, 1999

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL C., A MINOR BY HIS PARENT AND NEXT FRIEND STEPHEN C.	:	
V.	:	C. A. NO. 98-4690
RADNOR TOWNSHIP SCHOOL DISTRICT; PENNSYLVANIA DEPARTMENT OF EDUCATION	:	

WEINER, J. February 4, 1999

MEMORANDUM OPINION AND ORDER

Michael C.[1], a school aged student with learning disabilities, severe hemophilia, and a history of significant emotional problems, brought this action alleging the Radnor Township School District ("Radnor") and the Pennsylvania Department of Education failed to provide him with legally mandated educational services after he moved to Pennsylvania from Washington, D.C. The action is brought pursuant to the Individuals with Educational Disabilities Act ("IDEA"), 20 U.S.C. § 1400, et seq[2], section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and 42 U.S.C. § 1983. Presently before the court are the parties' cross motions for summary judgment based on the administrative record. The court heard oral argument on the motions on January 20, 1999. For the reasons which follow, the motions of the defendants will be granted.[3]

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1 Although plaintiff uses his complete name in his moving papers, we will continue to use his alias designation

2 20 U.S.C. § 1415(e)(2) provides that "[a]ny p[arty] aggrieved by the findings and decision made [by a State educational agency]... shall have the right to bring a civil action. . . .in a district court. . ."

3 The Pennsylvania Department of Education has also filed a motion to dismiss based, inter alia on the bar of the Eleventh Amendment. As that Amendment prevents federal courts from hearing § 1983 claims against state agencies, Quem v. Jordon, 440 U.S. 332, 338-345 (1978), the motion will be granted as to that claim. In discussing the other substantive arguments in the pend-

The facts underlying the action were established in the administrative proceedings and are not in dispute. Prior to August 1997, Michael lived with his father in Washington, where he was educated at the LAB School, a small private school for children with learning disabilities, pursuant to an Individualized Education Plan ("IEP") formulated by the Washington school authorities under IDEA. The IEP designated a private school placement with no integration with non-disabled children. Michael attended the LAB School for three years at public expense before he moved with his father to Pennsylvania.

In August, Stephen C. enrolled Michael at Radnor for the term to begin within the next few weeks. He informed Radnor that Michael had been attending the LAB School and sought a similar type of placement for the new school year. Radnor immediately began, with Stephen's permission, a multi -disciplinary evaluation of Michael. Radnor offered to place Michael in either a learning support program or a combined learning support/emotional support program at Radnor High School, as an interim placement. At this time, Radnor's multi-disciplinary evaluation of Michael had not been completed. By offering Michael a placement in Radnor High School, the Radnor officials determined that placement in a private school was unwarranted. Stephen C. rejected these options, electing to enroll Michael at the Hilltop School, a

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ing summary judgment motions, where the interests of the Department and Radnor are coextensive, we will treat them together.

private school located in Radnor Township. Michael remained at Hilltop for only forty-one days. In the Fall of 1997, the family relocated again to New Jersey, because of Stephen C's job. The dispute at issue here involves only the plaintiff's request for reimbursement of the cost for the forty-one days the C family lived in Radnor Township and Michael attended Hilltop. Because the family moved from Radnor so quickly, a final IEP was never developed.

In January 1998, Stephen C. requested a due process hearing to seek reimbursement of the tuition at Hilltop. A hearing was convened on April 30, 1998 and a written decision was handed down on May 13, 1998, finding in favor of Radnor. This decision was affirmed on administrative appeal. This action then followed.

Reduced to its essence, this action presents a pure legal issue which, we believe, is a question of first impression: the application of IDEA's "stay put" provision when a student moves from one state to another. To understand this issue, some background on IDEA is helpful. The Act was passed in order "to assure that all children with disabilities have available to them ... a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(c). The Act requires, inter alia, that a school district give a child's parents written notice of any proposed change in the child's established educational program. § 1415(b)(1)(C). If they object, they are entitled to seek an impartial administrative hearing, an administrative appeal and an appeal to the federal courts. §§ 1415(b)(2), (e)(2). Most important to this suit, the Act contains the so-called "stay put" provision:

> . . . during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

20 U.S.C. § 1415(e)(3)(A).

This provision "functions, in essence, as an automatic preliminary injunction" Drinker by Drinker v. Colonial School Dist., 7S F.3d 859, 864 (3d Cir. 1996); Zvi D. v. Ambach, 694 F.2d 904, 906 (2d Cir. 1982), preventing a school district from taking unilateral action to change a child's educational placement. The threshold inquiry in these types of cases thus becomes the identification of "the then current educational placement" of the handicapped student.[4]

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[4] Radnor argues that there is an even more preliminary inquiry: whether § 1415(e) applies at all. It argues the stay-put provision does not apply because at no time during Michael's brief residency was there an ongoing "proceeding" pending. They cite to the fact that Stephen C.'s request for a due process hearing was not made until after the C.'s moved to New Jersey. We cannot agree with this assertion. We find the "any proceeding" language of § (e)(3)(A) cannot be construed so narrowly. Clearly, it refers not only to hearings conducted under the section, but to all the types

Unfortunately, this is not always a simple endeavor. While the provision is straightforward, its application *sub judice* has a major wrinkle: the statute is silent on how to apply the stay- put provision when a student transfers from a different state.[5]

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of proceedings set forth in § 1415(b). These include the opportunity of the parent or guardian to inspect relevant records with respect to the child's evaluation, and the notice requirement the school district must satisfy when making the initial placement decision. Both are part of the process by which a school district changes a student's placement, but by definition occur before the start of a due process hearing. Such "proceedings" had clearly begun here; it is undisputed that Radnor began its multi -disciplinary evaluation and sent the required notice to Stephen C. informing him of its interim placement decision.

5 We note one other quirk. When Congress wrote the statute its purpose was to prevent school district from keeping handicapped children *out* of public schools. Honig v. Doe, 484 U.S. 305, 323 (1988) ("Congress very much meant to strip schools of the unilateral authority they had traditionally employed to *exclude* disabled students, particularly emotionally disturbed students, from school.") (emphasis added). Here, we deal with a school district seeking to keep a student *in* the public schools when his last IEP, formulated under a different state's regulations, provided for a private school placement at public expense. The case law interpreting IDEA, however, makes no distinction between the two situations.

As we stated above, there is no other Judicial authority which directly decides this issue. Radnor argues, and the administrative hearing officer agreed, that the decision is controlled by two rulings of the U.S. Department of Education's Office of Special Education Programs (OSEP). In Inquiry of Reiser, OSEP Policy Letter, July 17, 1986, *reprinted in* 2 Educ. Handicap. L. Rptr. 211:403 (USDE 1986), OSEP determined that "pendency" applied when a student transfers *intrastate.* In other words, where a student transfers between two school districts located in the same state, the receiving district is required to accept the IEP drafted by the former district and respect the student's then current placement until a new IEP is formulated. OSEP concluded that since both school districts were agents of the same state, acting under the same statewide regulations, the IEP formulated by the former district was entitled to a presumption of correctness. On the other hand, in OSEP Policy Memorandum 96-5, *reprinted in* 24 Indiv. Disabil. Educ. L. Rptr. 320 (USDE Dec. 6, 1995) the agency determined that where a student transfers *interstate,* the rationale of Reiser is not applicable:

> ... the entitlement to [free appropriate public education] FAPE, by its terms, encompasses an appropriate educational program that is individually-designated for each disabled student in accordance with the requirements of Part B *and the educational standards of the State in which the student's parents reside* .... Since the State A school district's evaluation and IEP were based in part on the education standards and eligibility requirements of State A, *the student's evaluation and IEP developed by the State*

A school district might not necessarily be consistent with the education standards of State B.

24 Indiv. Disabil. Educ. L. Rptr. at 321 (emphasis added). Thus, as construed by OSEP, IDEA mandates intrastate pendency, but not interstate pendency. Rather than require interstate pendency, Policy Memorandum 96-5, requires the new school district conduct an interim review and program implementation.[6] Radnor argues that the interpretation espoused by OSEP, as the agency charged with implementing IDEA, is entitled to deference.[7]

Courts have long recognized that "considerable weight" must be conferred to an executive department's construction of a statutory scheme which it is entrusted to administer. This type of deference

> has been consistently followed by [the Supreme] Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the

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[6] "If the former IEP is rejected by the new district or the parents, an IEP meeting must proceed in accordance with Part B timelines .... During the evaluation, the student should be placed pursuant to an agreed-upon interim IEP, or in regular education in absence of such an agreement." Id. at 320.

[7] Radnor does take exception to that portion of Policy Memorandum 96-5 which requires interim assessment and program implementation, arguing that it has no basis in the language of the statute. We need not reach this question to resolve the pending motions

> given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations .... If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.

Chevron. U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 844-45 (1984). The agency's interpretation must be upheld even if that interpretation is not the only reasonable one or even the most reasonable. Grocery Town Market, Inc. v. United States, 848 F.2d 392, 396 (3d Cir. 1988). The consistency or lack thereof in an agency interpretation is often crucial in determining the de2ree of deference to be afforded that interpretation. West v. Bowen, 879 F.2d 1122, 1134 (3d Cir. 1989) (Mansmann, C.J., concurring and dissenting).

We find that OSEP's distinction between intrastate and interstate transfers is rational, reasonable and entitled to deference. IDEA, while a federal statute, recognizes that education is a traditionally state function and it is the responsibility of state and local education agencies to provide education for all children with disabilities. See 20 U.S.C. § 1400(b)(8); see also Board of Education v. Rowley, 458 U.S. 176, 183 (1981) (". . . although the Act leaves to the States the primary responsibility for developing and executing educational programs for handicapped children, it imposes significant requirements to be followed in the discharge of that responsibility."). IDEA does not impose nation-wide

standards for special education, but rather requires states who wish to participate to create their own standards that conform to IDEA requirements. 34 C.F.R. § 300.8. States must also exercise general supervision over all programs in the state that provide educational services to disabled students, and must ensure that all such programs meet state educational standards. 34 C.F.R. § 300.600. These federal regulation s recognize that state programs will not be identical; thus the first duty imposed on the receiving school district is to examine whether the IEP created by the out of state district meets the education standards of the student's new state of residence. It is not hard to conceive a situation where an existing IEP would be unacceptable because its provisions *fall below* the standards of the new state. If OSEP where to require the new state to blindly accept the existing IEP, the

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s Plaintiffs also argue that Pennsylvania's regulations, incorporating, an even broader pendency requirement than required by the federal statute, require Radnor accept the existing IEP. They note that Pennsylvania a requires that "no change in the identification, evaluation, educational placement or IEP of an exceptional student . . . may by made during the pendency of an administrative or judicial proceeding unless agree to by the parties . . . ." Pa. Code § 14.61(b). We cannot agree that Pennsylvania's regulation *required* Radnor to place Michael in a private school. While plaintiffs are correct that a school district may violate IDEA if it fails to adhere to more stringent state law regulations, Firth v. Galeton Area School Dist., 900 F.Supp. 706, 712, n. 9 (M.D. Pa 1995), citing Doe v. Board of Education, 9 F.3d 455, 457 (6th Cir. 1993), since federal statutory pendency only applies in an 'intrastate transfer situation, and the Pennsylvania a regulations are silent on accepting out of state IEP's, we find the OSEP regulation is applicable.

new state would be required to violate its own IDEA standards. Accordingly, we conclude that (1) OSEP's decision to create a distinction between intrastate and interstate transfers represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute;[9] and (2) that under OSEP Policy Memorandum 96-5 there was no requirement that Radnor accept the Washington IEP's conclusion that Michael be placed in a private school.[10]

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[9] Plaintiffs' argument, that the 1997 amendments to IDEA explicitly state that OSEP's policy statements are not entitled to the force of law, is over broad. In enacting 20 U.S.C. § 1406(b), Congress prohibited the Secretary of Education from implementing any regulation which would "procedurally or substantively lessen the protections provided to children with disabilities in regulations in effect as of July 20, 1983 ... except to the extent that such regulation reflects the clear and unequivocal intent of Congress in legislation." Plaintiff has pointed to no regulation in effect prior to the listed date which is in conflict with the Reiser/Policy Memorandum 96-5 dichotomy.

[10] Although the issue was not specifically raised by the parties, we find the administrative hearing officer was supported by substantial evidence when he concluded that Radnor's interim offer would have provided Michael with a close approximation of the placement he received in Washington. The main difference between the two was the fact that Michael's classes would have been physically located in Radnor High School, rather than a smaller private school setting. But the purpose of the stay put provision is to reserve the status quo of the child's "functioning placement and program" until the underlying IDEA litigation is resolved. Drinker by Drinker, 78 F.3d at 865, quoting Woods v. New Jersey Dept. of Educ., No. 93-5123 (3d Cir. Sept. 17, 1993). The term "place-

Plaintiffs next argue that Radnor also violated Section 504 of the Rehabilitation Act, 29 U.S.C. § 794.[11] The complaint alleges that Radnor made Michael the subject of discriminatory treatment concerning the application of the pendency doctrine and, because of his disability, treated him differently from other students who would transfer into Radnor from within Pennsylvania. complaint 1123-24. These claims are clearly derivative of the plaintiffs' claim under IDEA since they relate to Radnor's failure to accept the Washington IEP's requirement of a private school placement. We are constrained to find that the § 504 claim must fail. 34 C.F.R. § 104.36, the federal regulation governing the application of § 504 to educational placement of handicapped students, like § 1415 of IDEA, provides that school districts that receive federal funds must establish procedural safeguards with respect to actions regarding the identification evaluation or educational placement of the handicapped. The regulations

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ment", however, is not synonymous with "place" and we can find no requirement in the Act or regulations that requires even an intrastate transfer to be maintained in a private school, if the child's new school district can offer ail the elements of the existing IEP in its public schools.

11 "No otherwise qualified individual with a disability in the United States, as defined in section 706(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ....."

go on to provide that "[c]ompliance with the procedural safeguards of section 615 of the Education of the Handicapped Act [IDEA's statutory predecessor] is one means of meeting this requirement." Thus where a school district complies with §1415, is also satisfies the requirements of § 504 of the Rehabilitation Act. As we find that Radnor as complied with § 1415, the § 504 claim must also fail.

Finally, the complaint sets forth a cause of action under 42 U.S.C. § 1983. In ¶¶ 25-27, plaintiffs assert that Radnor has violated their rights to interstate travel and to equal protection of the laws by setting up a classification which discriminates against handicapped students who transfer to a Pennsylvania school district from out of state. They seek the application of strict scrutiny. We do not believe that a long discussion of this issue is necessary. In contrast to those interstate travel cases which struck down state laws imposing residency requirements for state services because of newly arrived resident could not receive the same benefit as a long term resident, see e.g. Maldonado v. Houstoun, 157 F.3d 179 (3d Cir. 1998) (striking down Pennsylvania statute providing for twelve month residency period to receive full welfare benefits), here no long term Pennsylvania resident could have received the benefit sought by the plaintiffs. As we noted above, there is no requirement in the Act or regulations that requires even an intrastate transfer to be maintained in a private school, if the child's new school district can offer all the elements of the existing IEP in its public schools. Thus, a newly arrived transfer student from Washington, D.C. was in exactly the same position as a newly arrived transfer student from any Pennsylvania school district. Accordingly, we can perceive no impact on the Cs.' right of interstate travel from

Radnor's insistence on providing Michael's special education services in a public school building.

For these reasons, summary judgment will be granted in favor of defendants. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL C., A MINOR BY HIS PARENT
AND NEXT FRIEND STEPHEN C.

v. C.A. NO. 98-4690

RADNOR TOWNSHIP SCHOOL DISTRICT;
PENNSYLVANIA DEPARTMENT OF EDUCATION

ORDER

The motion to dismiss of the Pennsylvania Department of Education (Docket #5) is GRANTED IN PART. The motion is GRANTED to the extent it seeks dismissal of plaintiff's claim pursuant to 42 U.S.C. § 1983. The motion is DENIIED in all other regards.

The motion of Radnor Township School District for disposition on the administrative record in accordance with 20 U.S.C. § 1415(i)(2) or, in the alternative, for summary judgment (Docket # 12) is GRANTED.

Judgment on the merits is ENTERED in favor of Radnor Township School District and against plaintiffs Michael C. a minor by his parent and next friend Stephen C. and Stephen C.

The motion of the Pennsylvania Department of Education for disposition on the administrative record in accordance with 20 U.S.C. § 1415(i)(2) or, in the alternative, for summary judgment (Docket # 11) is GRANTED.

Judgment on the merits is ENTERED in favor of the Pennsylvania Department of Education and against plaintiffs Michael C. a minor by his parent and next friend Stephen C. and Stephen C.

Plaintiffs' motion for summary judgment or for disposition on the administrative record (Docket #13) is DENIED.

The Clerk of Court is DIRECTED to close this case.

IT IS SO ORDERED.

APPENDIX E – SPECIAL EDUCATION DUE PROCESS REVIEW PANEL COMMONWEALTH OF PENNSYLVANIA DATED JUNE 26, 1998

SPECIAL EDUCATION DUE PROCESS APPEALS REVIEW PANEL COMMONWEALTH OF PENNSYLVANIA

IN RE THE EDUCATIONAL ASSIGNMENT
OF MICHAEL C., PREVIOUSLY A STUDENT
SPECIAL EDUCATION
IN THE RADNOR TOWNSHIP SCHOOL DISTRICT

SPECIAL EDUCATION OPINION NUMBER 834

BEFORE APPEALS PANEL MEMBERS SALVIA, HARTWIG AND GONICK OPINION BY GONICK, APPELLATE OFFICER

BACKGROUND

Michael C. is a 17 year old 10th grade student who resided in the Radnor Township School District (District) for the first eight weeks of the 1997-1998 school year (NT 113). Before moving to Radnor Township School District, Michael lived and attended school in Washington, D.C. After a brief

stay in the Commonwealth of Pennsylvania[1], Michael moved with his father to New Jersey (NT 104).

The issue in this case is whether the District is obligated to reimburse the parent for tuition costs incurred for the 41 days Michael attended private school while he resided in the District.

The facts are not in dispute. Michael was identified as a child with a disability by the District of Columbia Public Schools. In grades 7-9, Michael attended The Lab School of Washington, a small private school that served only learning disabled students (NT 104, 107-108). Michael's tuition at The Lab School was paid for by the D.C. Public Schools (NT 104-105). Had Michael remained a resident of Washington, D.C., he would have been placed at The Lab School for 10th grade (S-1).

When Michael moved to Pennsylvania, his fat'-her requested that the District place Michael at Hill Top School, a private school, and pay his tuition there. The District responded that it would not do so at that time (S-4). Instead, the District sought permission to conduct a multidisciplinary evaluation (MDE) and offered to provide Michael with an interim special education program at Radnor High School while the evaluation was being completed (S-2, S-3, S-5, S-10). [2] Shortly before the 1997-1998 school year began, the parent enrolled Michael at Hill Top School (NT 111-113).

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[1] Michael was a Pennsylvania resident from June, 1997, until the end of October, 1997 (NT 104, 113; S-17).

[2] The parent was given two options: (1) enrollment in regular education with learning support for math, written expression and study skills, or (2) enrollment in the emotional support program

Approximately 5-1/2 months after the parent's request for tuition reimbursement was refused, the parent asked that a due process hearing be convened (S-4, S-20, S-22). The hearing was held April 30, 1998. The parent argued that: (1) Michael's last agreed upon placement was The Lab School and that stay-put, or pendency, required that the District pay for the cost of a similar placement in Pennsylvania; (2) Michael was discriminated against in violation of Section 504 of the Rehabilitation Act of 1973; and (3) the District's refusal violated the family's constitutional rights to travel and to equal protection of the law. The District countered that the dispute was controlled by OSEP Policy Memorandum 96-5 (OSEP 96-5), which outlines the obligations of states and school districts in interstate transfer situations and provides that when a disabled student moves from one state (State A) to another (State B), the State B school district is not required to adopt the most recent evaluation and IEP developed by the State A school district.

The hearing officer decided that the District was not required to reimburse the tuition incurred for Michael's placement at Hill Top. The parent filed exceptions asserting that pendency, Section 504 and constitutional protections support his claim. For the reasons which follow, the Panel affirms the hearing officer's denial of tuition reimbursement.

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with learning support in mathematics and participation in a regular education elective course. The District also indicated its willingness to provide the speech/language therapy and counseling specified in Michael's D.C. Public Schools Individualized Education Program (IEP). See S-10

DISCUSSION

The parent's claim must fail for two reasons. First, pendency does not apply in this case. Second, the parent does not have standing.

Pendency

Special education law and regulations provide that a child's then-current educational placement shall not be changed during the pendency of an administrative or judicial proceeding. Section 615(j) of IDEA Amendments of 1997; 22 Pa. Code Section 14.61(b). Third Circuit and Pennsylvania cases have held that stay-put is the operative placement actually functioning at the time the dispute arose and that the key factor is the IEP being implemented at the time the dispute arose. Kayla R., Spec. Educ. Opinion No. 734 (1996). As the Third Circuit observed in Susquenita School District v. Raelee S., 96 F.3d 78, 83 (3d Cir. 1996):

> Given the protective purpose underlying the pendent placement provision, it is often invoked by a child's parents in order to maintain a placement where the parents disagree with a change proposed by the school district; the provision is used to block school districts from effecting unilateral change in a child's educational program. In cases of this type we have directed that "the dispositive factor in deciding a child's current educational placement should be the Individualized Education Program ... actually functioning when the stay put is invoked."

However, the Raelee S. court also held that because the parents had rejected the placement proposed for their daughter

and placed her in private school, the protection of stay-put was not invoked: "Prior to the time the education appeals panel announced its decision, then, the pendent placement provision was inoperative." Raelee S., supra, 96 F.3d at 83.

Thus, to determine whether stay-put even applies here, it is necessary to ascertain what Michael's placement was at the time the due process proceedings were initiated in January, 1998.

The record is clear. The parent unilaterally removed Michael from his placement at The Lab School when the parent moved to Pennsylvania. During Michael's short-lived stay in the Commonwealth, he was enrolled at Hill Top School without District concurrence. After Michael's MDE was completed but before a meeting of the IEP team could be held, the parent advised the District that he and Michael would be moving to New Jersey by October 31, 1997 (NT 56-58; S-7, S-9, S-11, S-15, S-16, S-17, S-18, S-19). This move occurred on schedule and Michael was a New Jersey resident when due process was initiated.

Under these circumstances, the Panel must conclude that pendency does not apply in this case. The purpose of stay-put is stability or continuity in the child's placement during the pendency of administrative and judicial proceedings. Kayla R., supra. Here, the parent had unilaterally withdrawn Michael from The Lab School and thereby rendered pendency inoperative. Raelee S., supra. At no time subsequent to Michael's removal was there a decision by the District or the Commonwealth (through its appeals panel) that could be construed to create a new agreed upon placement. Therefore, the parent's assertion that pendency requires the District to reimburse Michael's tuition at the private school is without merit.

Standing

OSEP 96-5 provides, in part, as follows:

> If the school district in State B elects not to adopt the State A school district's evaluation of a student who transfers into its jurisdiction, the school district in State B must evaluate the student without undue delay and provide proper notice to parents. 34 CFR Sections 300.128, 300.220 and 300.504 (a). The evaluation would be treated as a preplacement evaluation of the student under 34 CFR Section 300.531, and the school district in State B must obtain parental consent under 34 CFR Section 300.504(b)(1)(i) before conducting this evaluation.
>
> While the evaluation is in process, the school district in State B could serve the student in a special education placement in accordance with an interim IEP unless the parents and State B school district are unable to agree on an interim placement, in which case, the student would be placed in the regular school program. once the school district in State B completes the student's evaluation, an IEP meeting must be convened without undue delay, but in no case later than thirty calendar days after the date of the eligibility determination. 34 CFR Section 300.343(c). At this IEP meeting, the State B school district must develop and adopt an IEP for the student that addresses his or her unique educational needs.[3]

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[3] 24 IDELR 320

In this case, the District offered an interim IEP which the parent rejected (NT 48-54). At that point, Michael was considered a regular education student. The District evaluated Michael without undue delay and provided proper notice to the parent (NT 47; S-3). During the course of the MDE process Michael was entitled to the procedural safeguards that exist to protect his rights as a student thought to be exceptional. Until such time as the eligibility assessment process was completed, including the appointment of an IEP team to review the recommendations of the multidisciplinary team and to determine whether Michael was exceptional, the Appeals Panel's authority was limited. At most, the Panel was authorized to require that the MDE/CER/IEP process be undertaken within the parameters specified in special education regulations. Jason I., Spec. Educ. Opinion No. 819 (1998). Significantly, Michael's departure from the Commonwealth occurred before the eligibility assessment process was completed. In essence, Michael left Pennsylvania as a regular education student. Thus, we conclude that the parent lacks standing to pursue his claim for tuition reimbursement.

ORDER

Accordingly, June 1998, the order of the hearing officer denying the parent's claim for tuition reimbursement is affirmed and all exceptions not specifically addressed by this decision and order are dismissed. While affirming his result, we modify the reasoning of the hearing officer to the extent it differs from that of this Panel.

Pursuant 22 Pa. Code Section 14. 64 (m) , the parties are advised that this matter may be appealed to the Commonwealth Court of Pennsylvania or to the appropriate federal district court.

Jeffrey Genick,
for the Appeals Panel

Signature and Mailing Date: June 26, 1998

APPENDIX F- OPEN HEARING
DATED APRIL 30, 1998

Due Process Hearing for Michael Conafay
Date of Birth: December 23, 1980
Date of Hearing: April 30, 1998

OPEN HEARING

Parties to the Hearing	Representative:
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Date of Decision: May 13, 1998

Hearing Officer: Mark G. Drenning

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I. BACKGROUND

Michael Conafay is a 17-year-old student with learning disabilities. Prior to the 1997- 1998 school year, Michael lived in Washington, D.C., and attended a private school for students with learning disabilities. This placement was funded by the D.C. Public Schools as Michael's special education program. In the summer of 1997, Michael and his father moved to the Radnor Township School District in Pennsylvania. On an interim basis, while a multi-disciplinary evaluation could be conducted, the school district offered to place Michael in one of two special education programs at its high school. Michael's father rejected this interim offer and placed Michael unilaterally at the Hilltop School, another private school for students with learning-disabilities. Michael and his father moved to New Jersey in the fall of 1997, after the school district had completed its evaluation but before an IEP meeting could be convened. Michael's father now seeks reimbursement of the costs of Michael's placement at the Hilltop School.

II. FINDINGS OF FACT

1. Michael Conafay (Michael) is a 17-year-old student who is eligible for special education and related services under the category of a Specific Learning Disability (SLD). (N.T. at p. 105; S-1; 20 U.S.C. § 1401(a)(1)(A); 34 C.F.R. § 300.7(a)(1); 22 Pa. Code § 14.1.22 Pa. Code § 342.1.)

2. Until the summer of 1997, Michael resided with his father, Stephen Conafay (Mr. Conafay) in the District of Columbia (D.C.). (N.T. at p. 104.)

3. Michael had been identified by the D.C. Public Schools as a student with learning disabilities. (N.T. at p. 105; S-1.)

4. Besides his learning disabilities, Michael has hemophilia and a history of significant emotional problems. (N.T. at p. 105.)

5. For the three school years prior to 1997-1998 the D.C. Public Schools had placed Michael at the Lab School, a private school for students with learning disabilities. (N.T. at pp. 104-108.)

6. During the summer of 1997, Mr. Conafay and Michael moved from D.C. to Radnor Township, Pennsylvania. (N.T. at pp. 45, 104.)

7. Soon after moving to Radnor Township, Mr. Conafay contacted the Radnor Township School District (District) in order to enroll Michael for 1997-1998. Mr. Conafay informed the District that Michael had been attending the Lab School due to his disabilities and that Michael would require a similar type of program for the upcoming school year. (N.T. at pp. 45.)

8. The District immediately requested permission, which Mr. Conafay gave, to conduct a multi-disciplinary evaluation (MDE) of Michael. (N.T. at p. 46; S-2; S-3.)

9. On an interim basis, the District offered to place Michael in either a learning support program or a combined learning support/emotional support program at the District's regular education high school. (N.T. at pp. 49-50.)

10. Mr. Conafay rejected this interim placement and unilaterally enrolled Michael at the Hilltop School, a private school for students with learning disabilities. (N.T. at pp. 45, 54, 108, 110-111.)

11. The MDE was completed in early October 1997, and a comprehensive evaluation report (CER) was sent to Mr. Conafay on October 13, 1997. (N.T. at p. 47; S-7; S-9; S- 11; S-15; S-16.)

12. Before an Individualized Education Program (IEP) team meeting could be convened, Mr. Conafay and Michael moved to New Jersey. (N.T. at pp.57-58,113;S-18;S-19.)

13. The program at the Hilltop School was able to implement the goals, objectives and specially designed instruction of Michael's last IEP from the Lab School with the exception

of required speech and language services. (N.T. at pp. 37-40.)

III. ATTENDANCE

The following persons were in attendance at the due process hearing:

On behalf of Michael:

Stephen Conafay	Father
Dennis McAndrews, Esq.	Counsel

On behalf of the District:

Dr. Marianne Price	Director of Pupil Services
Andrew Faust, Esq.	Counsel

On behalf of the Right to Education Office:

Dr. Rodney Warfield	Observing Hearing Officer

IV. ISSUES PRESENTED

Is Mr. Conafay entitled to reimbursement of the costs of Michael's placement at the Hilltop School for the period of time when Michael was a resident of the District?

V. DISCUSSION AND CONCLUSIONS OF LAW

Michael is a 17-year-old student with learning disabilities. (FF: 1.) Prior to the 1997- 1998 school year, Michael lived in Washington, D.C., and attended the Lab School, a private school for students with learning disabilities. (FF:5.) This placement was funded by the D.C. Public Schools as Michael's special education program. (FF:5.) In the, summer of 1997, Michael and his father, Mr. Conafay, moved to the District. (FF:6.) On an interim basis, while a MDE could be conducted, the District offered to place Michael in one of two special education programs at its high school. (FF:8; FF:9.) Mr. Conafay rejected this interim offer and placed Michael unilaterally at the Hilltop School, another private school for students with learning disabilities. (FF:10.) Mr. Conafay and Michael moved to New Jersey in the fall of 1997, after the District had completed its MIDE but before an IEP meeting could be convened. (FF:11; FF:12.) Mr. Conafay now seeks reimbursement of the costs of Michael's placement at the Hilltop School.

The facts of the present matter are essentially not in dispute. Both sides concur that Michael is in need of special education, that for the three years prior to the current school year, Michael attended a private school for students with learning disabilities, that this placement was publicly funded by the D.C. Public Schools in order to meet Michael's special education needs, that Michael moved to Pennsylvania in the summer of 1997, that the District offered Michael an interim placement in a special education program at its high school while a MDE was being conducted, and that Mr. Conafay instead chose to place Michael at the Hilltop School. Minor factual disagreements do exist, such as when Mr. Conafay made the decision to place Michael at the Hilltop School however, none of these minor disagreements is relevant to the central issue, namely whether the District was obligated, as a matter of "stay-put," to fund Michael's placement at the Hilltop School until a final resolution on a permanent placement had been reached. Quite frankly, if-such an obligation existed on the part of the District, the timing of Mr. Conafay's decision would be immaterial--the District's obligation would have initiated upon Michael's arrival in Pennsylvania.

The case at hand, devoid of any relevant factual controversy, comes down to a legal dispute. The District's position is that the U.S. Department of Education's Office of Special Education Programs (OSEP) has issued a policy memorandum on the subject of interstate transfers, that this memorandum is entitled to deference, and moreover, represents a valid interpretation of the federal Individuals with Disabilities Education Act (IDEA), that the District compiled with

the guidelines outlined in the OSEP memorandum, and that the District was not obligated under these guidelines to fund Michael's placement at the Hilltop School or any other private school, even on an interim basis. Mr. Conafay argues, on the other hand, that the OSEP memorandum is not a valid interpretation of the IDEA and should not be deferred to by this hearing officer, that state regulations regarding "stay-put" establish a higher standard than federal law, that as a matter of "stay-put" the District was obligated to fund Michael's placement at a private school similar to the Lab School, and that the Hilltop School was such a placement. Clearly, the OSEP memorandum is at the core of this dispute, and specifically, the issue of whether this memorandum should be granted deference by this hearing officer. Accordingly, a review of the memorandum is a necessary starting point for the discussion to follow.

First, however, this hearing officer must speak to the matter of deference. It is a well- established principle in judicial caselaw that when a governmental agency has authority to implement a statute, its interpretation of that statute should be given due deference. This is not to say that an agency's statutory interpretation is legally binding; however, in the absence of a contradictory interpretation by a higher authority, such as a court of competent jurisdiction, or without some other compelling reason to reach a different conclusion, the agency's interpretation of the statute should be given substantial credence. Nothing in the IDEA, not even in the most recent amendments, suggests that OSEP policy

memoranda should not be afforded this type of deference. *See* Section 607(c)-(f) of the IDEA Amendments of 1997. In the present case, neither side cites to caselaw on the issue of interstate transfers, Moreover, this hearing officer is unaware of any caselaw in the Third Circuit which speaks directly to the issue of how the IDEA's "stay-put" provision at 20 U. S.C. 1415(e)(3) *(see also* Section 615(j) of the IDEA Amendments of 1997) should be applied when a student moves from one state to another. Accordingly, the OSEP memorandum on interstate transfers is the only guidance available on this subject and should be given deference unless a compelling reason exists not to accept OSEP's interpretation of the IDEA.

The OSEP memorandum, dated December 6, 1995, was issued in response to numerous requests for classification of the IDEA's requirements when a student with disabilities makes an interstate transfer ("moves from State A to State B"). *See OSEP Policy Memorandum,* 24 IDELR 320. From the start of this memorandum, OSEP states that "the State B school district is *not* required to adopt the most recent evaluation and implement the most recent individualized education. program (IEP) developed for the disabled student by the State A school district." *Id.* (emphasis added). OSEP then outlines the procedures to be followed by the State B school district in order to ensure that the student's IDEA rights are observed and that the student is provided an appropriate educational program and placement in a timely manner. *Id.*

Mr. Conafay does not suggest that the District failed to comply with the procedures set out in the OSEP memorandum. Rather, his primary argument is with the memorandum itself, and specifically, the memorandum's failure to recognize the explicit language of the IDEA's "stay-put" provision. While it is true that the memorandum does not specifically cite to the "stay-put" provision, OSEP does offer the following rationale for its conclusion that the State B school district is not obligated to implement the student's IIEP as developed by the State A school district:

> Under Part B [of the IDEA], each State and its local school district must make a free appropriate public education (FAPE) available to all resident children with disabilities in mandated age ranges, and must ensure that the fights and protections of Part B are afforded to eligible children and their parents. 20 U.S.C. 1412(2) and (5). FAPE includes, among other elements, the provision of special education, and related services, at no cost to the parents, that meets State education standards and Part B requirements, in conformity with an IEP. 34 CFR 300.8. Thus, the entitlement to FAPE, by its terms, encompasses an appropriate educational program that is individually designed for each disabled student in accordance with the, requirements of Part B *and the education standards of the State in which the student's parents reside. In addition, under 34 CFR 300.600, each State must exercise general supervision over all programs in the State that provide educational services to disabled students, and must ensure*

> *that all such programs meet State educational standards and Part B requirements.*

Id. (emphasis added).

Quite simply, the OSEP memorandum reiterates a fundamental construction of constitutional and educational law, namely that the primary authority over public education rests with the individual states, and not the federal government. While acceptance of IDEA funds to support special education programs comes along with a state's commitment to the requirements of the IDEA, nothing in the IDEA itself diminishes state control over the public schools, nor could it. Under our constitutional system, the federal government is limited to only those powers specifically assigned to it, and control over education is not one of those powers. Accordingly, pursuant to the Tenth Amendment of the U.S. Constitution, the power over educational issues is reserved to the individual states. OSEP's memorandum, in recognizing that a student's current state of residence has both the authority and the prerogative to make its own determinations regarding the student's special education status, independent of those decisions made by any previous state of residence, merely reinforces a well-established constitutional principle.

Given this analysis, even if OSEPs memorandum contorts a literal reading of the "stay- put" provision, it is certainly defensible on the basis of a broad public policy in favor of

state control over education. Moreover, Mr. Conafay's argument that a literal interpretation of the IDEA's "stay-put" provision should invalidate the memorandum is not necessarily a foregone conclusion, either. "Stay-put" requires that during the pendency of administrative or judicial proceedings, a child's current educational placement must be maintained. Literally, it does not speak, one way or another, about maintaining a child's placement when the child transfers to a new school district, whether within the same state or a new state. Thus, it is a fair reading of the provision, though perhaps not the only interpretation of it, to assume that "stay-put" is not triggered by a transfer, but only by the initiation of administrative judicial proceedings. For all of these reasons, this hearing officer simply cannot find a compelling reason not to defer to OSEP's interpretation of the IDEA requirements with respect to interstate transfers.

As a final means of assaulting the OSEP memorandum, Mr. Conafay argues that the memorandum unconstitutionally infringes on the fundamental right to travel. Quite frankly, this hearing officer is concerned that such a purely constitutional argument is beyond his or any other hearing officer's jurisdiction. However, in order to answer all of Mr. Conafay's contentions, this hearing officer finds this particular argument to be specious at best, and certainly not compelling enough to invalidate OSEP's memorandum.

Supreme Court cases have established that the right to travel between states is a constitutionally protected liberty interest. This means that any law or governmental policy which infringes on this night must be held to the highest level of judicial scrutiny. However, the threshold test in these cases is whether the law or policy actually infringes on the fight to travel. Nothing in the present case suggests that the OSEP memorandum infringed on Michael's right to travel or would infringe on any other student's right to travel. Mr. Conafay and Michael would have moved to Pennsylvania from D.C. regardless of the OSEP memorandum. The memorandum, quite frankly, did not bar or place an undue burden on Michael's constitutional right to travel.

The above being duly noted, this hearing officer is not saying that the OSEP memorandum did not have some impact on Michael's exercising of his fight to travel; it is simply that the memorandum cannot be said to have infringed on that right. Whenever, a state law or program establishes a different set of eligibility criteria than exists in other states, there will naturally be an impact on the right to travel. For example, if D.C. had a minimum age for driving of 16 while Pennsylvania had a minimum age of 18, then Pennsylvania's legal age for driving could have an impact on any family's decision to travel or move to our state. The driving age would not bar any family from traveling or moving to Pennsylvania; it would simply bar some family members from driving once they were here. In the same vein, OSEP's memorandum and the District's application of its guidelines in Michael's case did not bar Mr. Conafay and Michael from

moving to Pennsylvania, although it did impact on the type of educational placement Michael would be offered once here.

Mr. Conafay further argues that even if OSEP's interpretation of federal law is accorded, due deference, Pennsylvania has established a higher standard in its regulations when it comes to "stay-put." Once again, this hearing officer is unconvinced. Nothing in Pennsylvania's regulations speaks directly to interstate transfers, nor do the regulations, even in their most general sense, indicate that Pennsylvania has adopted any standard above the federal requirements. While it is true that the state regulations do outline with some detail the procedures with respect to placement decisions, these procedures appear to this hearing officer to be clarifications of how to implement the federal IDEA requirements within Pennsylvania. Moreover, the regulations pertaining to placement clearly refer only to those students who have been deemed exceptional under the state standards. *See* 22 Pa. Code 14.1 - definition of educational placement ("[t]he overall, educational environment in which special education ... [is] provided to an *exceptional* student); 22 Pa. Code 14.1 - definition of change in educational placement (various references to exceptional and/or eligible students); 22 Pa. Code 14.41 (a) ("This section ... [relating to educational placement ...] appl[ies] only to *exceptional* students. ")(emphasis added). For the time in question, Michael was still undergoing his initial MDE in Pennsylvania, technically meaning that he had not yet been deemed exceptional. Thus, any regulations pertaining to educational placement or change in

placement were not applicable to Michael while the MDE was on-going.

Finally, Mr. Conafay argues that in light of a Pennsylvania policy regarding interdistrict transfers of exceptional students, under which receiving school districts must implement, all or most of the components in the IEPs from sending school districts, the application of OSEP's policy regarding interstate transfers unjustly discriminates against students with, disabilities who move into Pennsylvania from another state, in violation of Section 504 of the Rehabilitation Act of 1973. *See Basic Education Circular,* Interdistrict Transfers, 22 Pa. Code 14.31 (Sept. 1, 1997). This argument, however, like all of the other arguments raised by Mr. Conafay, is unconvincing to this hearing officer.

First, any discrimination caused by these two policies is not on the basis of disability, but rather on the basis of geography. Second, as explained above, there is a rational reason for applying a different standard to students who transfer from another state, namely that the receiving state, in exercising its primary authority over educational matters, has the right to identify the student's special education needs under its own state standards. To wit, an IEP written by either school district C or a, both of which are in State A, must meet State A's standards and should all be capable of being implemented regardless of whether the student transfers from C- to D or from a to C; on the other hand, an IEP developed in State A does not necessarily meet the standards for an IEP in State B, and thus a school district in State B cannot be compelled to implement such an IEP. This dichotomy of

standards between IEPs developed within a state of residence and IEPs developed outside the state of residence is rationally based, does not constitute differential treatment for disabled students as compared to non-disabled students, and therefore, is not violation of Section 504.

Having reviewed, and rejected, all of Mr. Conafay's legal arguments for not applying the OSEP memorandum, this hearing officer must make one last observation. Even if OSEP's policy on interstate transfers were to be invalidated, and a policy similar to Pennsylvania's BEC on interdistrict transfers were to be adopted for interstate transfers as well, this hearing officer is not convinced that the Hilltop School would have been Michael's "stay- put" placement. As the BEC explains:

> [I]f the parents want the new school district to maintain their child's old IEP (that is, the last IEP agreed upon by the parents and the former school district or last in effect pursuant to administrative or judicial order), the new district must do so until a new IEP is developed or approved. The old IEP constitutes the- student's "present educational, placement" for purposes of IDEA's pendency provision... [I]t may prove impossible for a new school district to maintain the old IEP in every respect. In such situations, the new school district "must provide services that approximate, as closely as possible, the old IEP."

Id. at 2, 4 (quoting an uncited policy of the U.S. Department of Education).

Although the parties stipulated that the Hilltop School's program closely approximated the Lab School program, with the exception that speech services were not provided at the, Hilltop School, nothing in the record suggested that the District's offer of an interim placement was not a close approximation to Michael's last IEP as well. In fact, the District's offer would have provided Michael with full-time learning support, the amount of integration with non-disabled peers could have been limited to meet Michael's needs, and all of his speech and language needs would have been addressed within his program. Accordingly, the only significant difference between the Hilltop School and the public, school alternative was the type of institutional setting, namely a small private school versus a large public high school. Michael's last IEP from the Lab School, however, did not specify any particular need of Michael's for placement only in a small private school. Accordingly, this hearing officer is not convinced that the Hilltop School was the only "close approximation" to the Lab School. Furthermore, in this hearing officer's opinion, the District's offer was probably a closer approximation to the Lab School program than even the Hilltop School was, when the availability of speech services is finally factored into the equation.

Thus, in summary, this hearing officer finds that the District complied with OSEP's- policy memorandum relating to interstate transfers when Michael's officer further finds that OSEP's policy should be accorded deference and that there is no compelling reason to invalidate OSEP's interpretation of the IDEA. Accordingly, this hearing officer denies Mr.

Conafay's request for reimbursement, of the costs of Michael's placement at the Hilltop School.

VI. ORDER

It is hereby ordered that Radnor Township School District shall not be required to, reimburse Stephen Conafay for the costs of Michael Conafay's placement at the Hilltop School.

Mark G. Drenning
Hearing Officer

May 13, 1998
Date

Supreme Court, U.S.
FILED
JUN - 8 2000
CLERK

(2)

No. 99-1801

In The

Supreme Court of the United States

MICHAEL C., A MINOR BY HIS PARENT AND NEXT FRIEND, STEPHEN C.; STEPHEN C., INDIVIDUALLY, AND ON HIS OWN BEHALF, BOTH OF

Petitioners,

v.

THE RADNOR TOWNSHIP SCHOOL DISTRICT, PENNSYLVANIA DEPARTMENT OF EDUCATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION OF RESPONDENT RADNOR TOWNSHIP SCHOOL DISTRICT

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QUESTION PRESENTED FOR REVIEW

The question to which the Petition for Writ of Certiorari in this case addresses itself is more accurately stated as follows:

Whether the Appeals Court, in affirming the district court's decision granting Respondent Radnor Township School District's motion for summary judgment, has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter; has decided an important question of federal law that has not been, but should be, settled by this Court; has decided an important federal question in a way that conflicts with relevant decisions of this Court; or has so departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power when the decision of the District Court regarding the implementation of the "pendency clause" of the Individuals with Disabilities Education Act in a situation when a student with disabilities moves from State A to State B, was consistent with Congress' legislative authority and design in enacting the Act, was consistent with the interpretation by the United States Department of Education – the federal agency charged with the administration of the Act – and was consistent with relevant caselaw?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

STATEMENT OF THE CASE 1

ARGUMENT – REASON FOR DENYING THE WRIT 3

I. The "Stay-put" Provision of Individuals with Disabilities Education Act Did Not Require the District to Implement an Out-of-State IEP 7

A. The IDEA and Interpretation by the United States Department of Education 7

B. The IDEA and Pennsylvania's Special Education Standards and Regulations 21

II. The Constitutionally Protected Right to Interstate Travel Did Not Require the District to Implement an Out-of-State IEP 22

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) 12

Carlisle Area School District v. Scott P., 62 F.3d 520 (3d Cir. 1995), *cert. denied*, 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544 (1996) 13

Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993) 9

Honig v. Doe, 484 U.S. 305, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988) 5, 6, 9

Maldonado v. Houstoun, 157 F.3d 179 (3d Cir. 1998), *cert. denied*, 526 U.S. 1130, 119 S.Ct. 1802, 143 L.Ed.2d 1007 (1999) 6, 23, 24

Saenz v. Roe, 526 U.S. 489, 119 S.Ct. 1518, 143 L.Ed.2d 689 (1999) 6, 22, 23, 24

Schumacher v. Nix, 965 F.2d 1262 (3d Cir. 1992), *cert. denied*, 507 U.S. 908, 113 S.Ct. 1252, 122 L.Ed.2d 651 (1993) 25

STATUTES

20 U.S.C. § 1402(a)(8) 12

20 U.S.C. § 1412(a)(1)(A) 12

20 U.S.C. §§ 1412(a)(14), (15), (16) 13

20 U.S.C. § 1412(a) 14

20 U.S.C. § 1412(c) 14

20 U.S.C. § 1413(a) 13

20 U.S.C. § 1414(a)-(c) 4, 7

TABLE OF AUTHORITIES – Continued

Page

20 U.S.C. § 1414(d)-(f) 4, 7

20 U.S.C. § 1415 ..... 5, 8, 9

20 U.S.C. § 1415(e)(3) 4

20 U.S.C. § 1415(f)(1) and (g) 13

20 U.S.C. § 1415(j) 4, 5, 8

22 Pa. Code § 14.2(b) and (d) 17

22 Pa. Code §§ 14.6, 14.8, 342.6, 342.8 14

22 Pa. Code §§ 14.23, 14.24, 342.23, 342.24 14

22 Pa. Code §§ 14.25(f), 342.25(d) 14

22 Pa. Code § 14.32(c) 15

22 Pa. Code §§ 14.32(f), 342.32(d) 15

22 Pa. Code §§ 14.35, 14.36, 342.35, 342.36 15

22 Pa. Code §§ 14.42, 342.42 15

22 Pa. Code § 14.42(e), 342.42(b) and (c) 15

22 Pa. Code § 342.25(b)(2) 15

22 Pa. Code § 342.25(j) 15

22 Pa. Code § 342.42(i) and (j) 15

22 Pa. Code Chapt. 14 14

22 Pa. Code Chapt. 171 15

22 Pa. Code Chapt. 342 14

CONSTITUTION

U.S. CONST. Article 1 Section 8 12

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

BASIC EDUC. CIRC. 22 PA. CODE § 14.1 (PDE 1997)..... 16

BASIC EDUC. CIRC. 22 PA. CODE § 342.42(c) (PDE 1997)..... 16

CERTIF. & STAFFING POLICY GUIDELINE No. 50 (PDE 1992)..... 16

Inquiry of Rieser, OSEP Policy Letter, July 17, 1986, *reprinted in* 2 EDUC. HANDICAP. L. RPTR. 211: 403 (USDE 1986) 10, 11, 17, 19, 20, 21

OSEP Policy Memorandum No. 96-5, reprinted in 24 INDIV. DISABIL. EDUC. L. RPTR. 320 (USDE Dec. 6, 1995)..... 10, 17, 18, 26

Public School Code of 1949, Act of Mar. 10, 1949, No. 14, P.L. 30, art. XIII, § 1373, *as amended*, 24 P.S. § 13-1373 16

STATEMENT OF THE CASE

The case below was predicated upon the Individuals with Disabilities Education Act ("IDEA") and the pendency requirements under the Act. The factual background of this dispute is straightforward. Michael C., hereinafter "the student," and Stephen C., hereinafter "the parent," or collectively "Petitioners," relocated to Pennsylvania, and to Respondent Radnor Township School District, hereinafter "the District," from the District of Columbia in August of 1997. The parent demanded that the District implement the student's then-existing District of Columbia Individualized Education Program ("IEP") at the Hill Top School, a private school that is not approved by the Commonwealth of Pennsylvania for the provision of special education to students with disabilities, because he felt that it best replicated the Lab School which the student had attended while a resident of the District of Columbia. The District reviewed the IEP and found nothing in it warranting so restrictive a placement and immediately sought permission to evaluate, which it began immediately and completed in an expedited fashion. At the same time, the District convened an IEP team well in advance of the beginning of the school term and, after reviewing records forwarded by the parent, determined that it could implement the District of Columbia IEP in either an emotional support ("ES") class or a learning support ("LS") class in Radnor High School. The District so notified the parent of this determination in writing, offering him the choice of either the ES or LS class in conjunction with placement in the high school program pending completion of the evaluation. Neither the student nor his parent attended the IEP team meeting.

The parent however rejected the District's offer out-of-hand in early September of 1997. The student never attended a District-sponsored program; instead, during the first six weeks of the 1997-1998 school term, the parent unilaterally placed him at the Hill Top School, the non-approved private school in which the parent had demanded the District place the student. As the District was completing its evaluation in mid-October of 1997, and an IEP team was preparing to convene to discuss a District-sponsored placement for the remainder of the school year, the student and his parent relocated again, to the State of New Jersey. The parent again refused to participate in the IEP team meeting, and the team never convened.

In January 1998, the parent requested a due process hearing demanding tuition reimbursement for the unilateral placement of the student at the Hill Top School during the first six weeks of the 1997-1998 school term. After a failed attempt to mediate the matter, a hearing convened on April 30, 1998, and the local-level hearing officer rendered a written decision in favor of the District on May 13, 1998. The parent filed exceptions with a state-level appeals panel, and, on June 26, 1998, the panel affirmed the decision of the hearing officer. On September 2, 1998, the parent filed a Complaint in the United States District Court for the Eastern District of Pennsylvania, initiating an action against both the District and the Commonwealth of Pennsylvania, hereinafter the "Commonwealth". The matter was assigned to the Honorable Charles R. Weiner. The administrative record was filed with the court by the Right to Education Office on December 7, 1998. The parties agreed that this matter

could be decided on cross-motions for summary judgment based upon the administrative record without further evidence. On February 5, 1999, Judge Weiner issued a Memorandum Opinion and Order wherein judgment was entered in favor of both the District and the Commonwealth. Petitioners filed an appeal to the Third Circuit Court of Appeals on February 9, 1999. On January 14, 2000, the Third Circuit affirmed the order of the District Court granting summary judgment in favor of the District and the Commonwealth. On February 11, 2000, the Third Circuit denied Petitioners' request for a rehearing. On May 9, 2000, a petition for writ of certiorari to the United States Court of Appeals for the Third Circuit was filed with this Court. The District opposes this petition.

ARGUMENT

REASON FOR DENYING THE WRIT

Contrary to the assertions of Petitioners, the Third Circuit has interpreted the "pendency clause" of the Individuals with Disabilities Education Act correctly and in a manner that is consistent with Congress' legislative authority and design in enacting the Act, consistent with the policy statement of the United States Department of Education – the agency charged with the administration of the IDEA – and consistent with relevant caselaw.

In support of their request, the Petitioners appear to proffer two principal legal theories under which they claim to be entitled to the tuition reimbursement they seek – violation of the IDEA's "stay-put" provision and infringement on the constitutionally protected right to

interstate travel. For the reasons that follow, both arguments are without merit. Therefore there is no reason, compelling or otherwise, for this Court to exercise its discretion to review the decision of the Third Circuit.

Petitioners contend that the IDEA mandates that a student who is evaluated and determined to need special education and related services in accordance with the IDEA-mandated multidisciplinary team process, *see* 20 U.S.C. § 1414(a)-(c), and for whom an IEP is developed in accordance with the IDEA-mandated IEP team process, *see id.* at § 1414(d)-(f), in one State is entitled to immediate acceptance and implementation of that evaluation and IEP upon relocating to another State. Such a mandate, however, appears nowhere in the IDEA itself, explicitly or implicitly; and as the Third Circuit correctly acknowledged, failure to include such a mandate is completely consistent with the legislative design for the Act envisioned by Congress – to encourage states to provide meaningful education to individuals with disabilities. Petitioners assert that such a mandate derives from the so-called "stay-put" provision of the Act. That provision, which has been part of the Act in one location or another since its initial enactment as the "Education of the Handicapped Act" in 1975,[1] simply precludes any change in the "then-current educational placement of the child" pending completion of the administrative and judicial

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[1] Prior to June 4, 1997 and the enactment of the latest round of revisions and amendments to the Act, the stay-put provision was located in 20 U.S.C. § 1415(e)(3). With language slightly modified to address issues not present in this case, the provision now appears in § 1415(j).

proceedings laid out by Congress in Section 1415 of the Act, 20 U.S.C. § 1415, to resolve disputes between parents and the local educational agency ("LEA") over identification, evaluation, program, and placement issues and over concerns with the implementation of programming for the student with disabilities. *See* 20 U.S.C. § 1415(j).

In determining that the District had no obligation under the "stay-put" provision to implement an out-of-state IEP, the administrative hearing officer, the district court judge, and the court of appeals properly relied upon the interpretation of this portion of the IDEA by the United States Department of Education ("USDE"), the federal agency charged with the administration of the IDEA. Through an Office of Special Education Programming ("OSEP") policy memorandum, the USDE makes clear that when a disabled student moves from State A to State B, the State B school district is not required to adopt the most recent evaluation and implement the most recent IEP developed for the student with disabilities by the State A school district.

In support of their request, Petitioners suggest that by its reliance on the USDE's guidance and its promotion of the legislative scheme of the Act, the Third Circuit significantly departed from this Court's decision in *Honig v. Doe*, 484 U.S. 305, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988). The *Honig* case is not dispositive of the issue that was presented to the court of appeals in the instant matter. *Honig* involved an interpretation of the "pendency clause" of the Act related to the obligation of a district that developed an IEP for a student with disabilities and then sought to modify the IEP through disciplinary exclusion of the student without the consent of the student's

parents, *see id.* at 323-29, 108 S.Ct. at 604-607. The facts in that matter are clearly distinguishable from the instant case. In fact, the only connection between this case and *Honig* is contained in the Court's *obiter dictum* in *Honig* wherein the "stay-put" provision has been construed broadly as the embodiment of a Congressional "presumption in favor of the child's current educational placement." *See id.* at 328, 108 S.Ct. at 606.

In addition, the Petitioners offer absolutely no support for their assertion that Pennsylvania special education standards and regulations establish a more liberal standard for interstate transfers which would require the District to implement an out-of-state IEP. Not only do the standards and regulations fail to establish a higher standard, they fail to even mention interstate transfers. The record is clear that the District more than complied with the IDEA and the requirement established by the USDE for interstate transfers.

Petitioners also appear to believe that the refusal of the District to place the student in the private school of the parent's choice immediately upon their relocation to Pennsylvania, and the insistence on the part of the District that it conduct an evaluation and develop an IEP in accordance with Pennsylvania law prior to committing to any program and placement other than an interim one, somehow impaired their constitutionally protected "right to interstate travel." They cite and rely heavily upon the recent decisions of this Court in *Saenz v. Roe*, 526 U.S. 489, 119 S.Ct. 1518, 143 L.Ed.2d 689 (1999) and the Third Circuit in *Maldonado v. Houstoun*, 157 F.3d 179 (3d Cir. 1998), *cert. denied*, 526 U.S. 1130, 119 S.Ct. 1802, 143 L.Ed.2d 1007 (1999), in support of their contention. Their

reliance on these cases is ill-founded because they stand for the proposition that movement into a new State of residence should not result in the receipt of lesser benefits than those enjoyed by the residents of the new State. In the instant matter, Petitioners are seeking greater benefits than would be afforded a Pennsylvania resident related to pendency. Therefore, their assertion of this interpretation of pendency is clearly inconsistent with the compelling interest and legitimate state purpose of the Commonwealth of Pennsylvania to carry out its plan for the implementation of the IDEA submitted to, and approved by, the USDE.

As more fully described below, none of the above legal theories proffered by Petitioners provides a compelling reason for this Court to exercise its discretion and review the decision of the Third Circuit.

I. The "Stay-put" Provision of Individuals with Disabilities Education Act Did Not Require the District to Implement an Out-of-State IEP.

A. The IDEA and Interpretation by the United States Department of Education

Petitioners contend that the IDEA mandates that a student who is evaluated and determined to need special education and related services in accordance with the IDEA-mandated multidisciplinary team process, *see* 20 U.S.C. § 1414(a)-(c), and for whom an individualized education program ("IEP") is developed in accordance with the IDEA-mandated IEP team process, *see id.* at § 1414(d)-(f), in one State is entitled to immediate acceptance and implementation of that evaluation and IEP

upon relocating to another State. Such a mandate, however, appears nowhere in the IDEA itself, explicitly or implicitly. Petitioners assert that the mandate derives from the so-called "stay-put" provision of the Act. That provision, which has been part of the Act in one location or another since its initial enactment as the "Education of the Handicapped Act" in 1975, simply precludes any change in the "then-current educational placement of the child" pending completion of the administrative and judicial proceedings laid out by Congress in Section 1415 of the Act, 20 U.S.C. § 1415, to resolve disputes between parents and the local education agency ("LEA") over identification, evaluation, program, and placement issues and over concerns with the implementation of programming for the student with disabilities. This section provides:

> [D]uring the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

20 U.S.C. § 1415(j). For several reasons, this provision on its face does not apply to the circumstances of the present case. First, at no time during Petitioners' brief residency in the Commonwealth of Pennsylvania was a proceeding "conducted pursuant to" § 1415 pending. The parent did not initiate a due process hearing at the local level until early 1998, several months after relocating himself and his son to New Jersey. Second, when he moved from the

District of Columbia to Radnor Township, the parent – and not the District – removed his son from his "then-current" educational placement. Therefore, maintenance of the "then-current" placement at the Lab School in the District of Columbia was not possible. Third, rather than seek, in this action, to maintain the "then-current educational placement," the parent seeks reimbursement after the fact for a unilaterally-selected new placement that the parent alone determined best replicated the District of Columbia-developed placement at the Lab School. Based upon these distinct facts, the "stay-put" provision of the IDEA does not apply as a legally cognizable basis for the reimbursement of private school tuition according to this Court's decision in *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 366, 126 L.Ed.2d 284 (1993).

Despite the apparent inapplicability of the language of the Act as written to the circumstances of this case, the District does concede that the "stay-put" provision has been construed broadly by this Court as the embodiment of a Congressional "presumption in favor of the child's current educational placement." *Honig*, 484 U.S. at 328, 108 S.Ct. at 606. Viewed thus, the provision was interpreted by this Court to bar the unilateral disciplinary exclusion of dangerous disabled students from school, apparently regardless of whether "proceedings" under Section 1415 were "pending" between the parents of the students and the school district. *Honig*, 484 U.S. at 323-29, 108 S.Ct. at 604-607. While the connection is at best attenuated between the stay-put provision – even construed broadly as in *Honig* – and the purported obligation of one school district to honor the evaluation and IEP of another

from which a disabled student has recently relocated, the Office of Special Education Programs ("OSEP") within the United States Department of Education has made it. The connection – not expressly made in any statutory language or in any controlling judicial interpretation of statutory language – appears in two statements of statutory interpretation and policy issued by OSEP concerning the rights of students with disabilities who transfer among different school districts both intra- and interstate.

Assuming the Court accepts that the "stay put" provision of the IDEA is implicated in some way in the relocation of a student with disabilities from one school district to another, the OSEP policy memoranda require careful scrutiny and lie at the heart of the dispute as it was presented and litigated in this case at the administrative, district court, and court of appeal levels.

As the hearing officer observed in his well-reasoned opinion in this case, which the appeals panel, the district court judge, and the court of appeals upheld, the evidence allows little room to dispute that the District more than complied with the requirements established by OSEP for *inter*state transfers, *see OSEP Policy Memorandum No. 96-5, reprinted in* 24 INDIV. DISABIL. EDUC. L. RPTR. 320 (USDE Dec. 6, 1995).[2] That memorandum presents a logical corollary to the long-standing policy interpretation of OSEP concerning *intra*state transfers. In *Inquiry of Rieser*, OSEP Policy Letter, July 17, 1986, *reprinted in* 2

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[2] A copy of this memorandum is attached hereto at App. 1-6 and shall hereafter be cited simply as the *"OSEP Memorandum."*

EDUC. HANDICAP. L. RPTR. 211: 403 (USDE 1986),[3] OSEP reviewed the written policy of the Pennsylvania Department of Education under which a successor Pennsylvania school district was not bound to implement as "pendent" the placement recommended by a predecessor Pennsylvania school district from which a disabled student had relocated. At the core of the conclusion that "pendency" applies to intrastate transfers was the following analysis:

> [In the case of an intrastate transfer, the] components of placement are found in, or are based on, an IEP developed with the participation of the parents by the previous LEA. That LEA, like the receiving LEA, is an agent of the Commonwealth of Pennsylvania's State Educational Agency (SEA). The SEA is the grantee of EHA funds, and is charged with the responsibility of ensuring the provision of a free appropriate public education through LEAs and other institutions. Once an IEP is developed in an LEA and the IEP is subject to whatever degree of administrative and judicial proceedings the parties elect to pursue, the IEP has the imprimatur of the SEA and carries a presumption of correctness, subject to formal revision as provided in the statute. This does not change when a child moves from one Pennsylvania LEA to another.

Rieser, 2 EDUC. HANDICAP. L. RPTR. 211: 403, at 3; App. at 12-13. The essential core of the analysis is that an IEP developed within a constituent "local educational agency" ("LEA") of a particular State bears the "imprimatur" not just of the LEA but of the State itself

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[3] A copy of this letter is attached hereto at App. 7-14 and shall hereafter be cited simply as "*Rieser*."

and thus enjoys a "presumption of correctness" in every constituent LEA of that State.

This notion of State-level ownership of IEPs developed by its "agent" school districts is entirely consistent with the literal structure and language of the IDEA as it has existed from its inception and as it exists today. As the Third Circuit correctly acknowledged, this notion is completely consistent with the legislative authority for the predecessor of the current Act derived from Congress' spending power, *see* U.S. CONST. Article 1 Section 8, and the legislative design for the Act envisioned by Congress – to encourage States to provide meaningful education to individuals with disabilities. That the Act is long on procedural requirements and short on substantive specifics, leaving the content of each child's "free appropriate public education" to the States, was long ago made clear by the U.S. Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176, 194-96, 102 S.Ct. 3034, 3044-3045, 73 L.Ed.2d 690 (1982) ("the Act imposes no clear obligation upon recipient States beyond the requirement that handicapped children receive some form of specialized education"). The "State Educational Agency" ("SEA") is charged under the Act with the direct responsibility of ensuring that all children between the ages of three and twenty-one within the State receive a "free appropriate public education," 20 U.S.C. § 1412(a)(1)(A), an umbrella term referring to the provision of a free preschool, elementary, or secondary education "under public supervision . . . in the State involved" that meets "the standards of the State educational agency," *id.* at § 1402(a)(8). In addition to requiring each of the various States to define the substantive standards for the provision of a "free

appropriate public education" to children with disabilities, the Act requires that each State develop a comprehensive system for the development of appropriate personnel to teach and provide related services to children with disabilities, develop personnel standards, and establish methods and standards for the assessment of the school performance of children with disabilities. *See id.* at §§ 1412(a)(14), (15), and (16).

The responsibilities of the various LEAs are entirely derivative of those of the SEA, and the LEAs can receive IDEA funding from the SEA only when they demonstrate compliance with the requirements of the Act "to the satisfaction of the State educational agency." *Id.* at § 1413(a). Although States can opt to implement a two-tier, local-to-state level administrative hearing system for resolution of disputes concerning the identification, evaluation, program, or placement of, or provision of a free, appropriate public education to, a child with disabilities, the ultimate arbiter of these issues at the administrative level is the SEA. *See id.* at § 1415(f)(1) and (g); *see also Carlisle Area School District v. Scott P.*, 62 F.3d 520, 529 (3d Cir. 1995), *cert. denied*, 517 U.S. 1135, 116 S.Ct. 1419, 134 L.Ed.2d 544 (1996) (in reviewing decisions of LEA hearing officers and SEA appeals panels in IDEA cases resolved under Pennsylvania's two-tier system of administrative process, courts must "defer to the appeals panel rather than the hearing officer in most circumstances"). Each individual State that receives federal funding under the IDEA is thus charged with the responsibility of defining the substantive standards for the provision of education to children with disabilities within its borders and for judging ultimately, at the administrative level,

whether the various LEAs have complied with those substantive standards. Each State assures compliance separately by maintaining on file with the USDE a plan outlining its means of implementing educational services for children with disabilities consistent with the broad parameters of the Act. *See* 20 U.S.C. § 1412(a) and (c).

Pennsylvania has fulfilled its role as a recipient of IDEA funds by adopting a comprehensive body of regulations issued by the State Board of Education, *see* 22 Pa. Code Chapt. 14, and standards issued by the Secretary of Education, *see* 22 Pa. Code Chapt. 342. These regulations and standards – unique to Pennsylvania just as the various laws and regulations adopted by the other recipient States are unique to those States – establish numerous requirements governing every aspect of the identification, evaluation, education, and placement of children with disabilities that are designed to implement the requirements of federal law but that do not derive directly from the language of the federal Act. Among these Pennsylvania-specific requirements are an array of staffing and personnel standards, *see* 22 Pa. Code §§ 14.6, 14.8, 342.6, and 342.8; a process of early screening and intervention for students prior to referral to the federally-mandated multidisciplinary team evaluation, *see id.* at §§ 14.23, 14.24, 342.23, and 342.24; standards for the minimum constitution of the multidisciplinary team that evaluates the student to determine eligibility for special education services, *see id.* at §§ 14.25(f), 342.25(d); specific standards for the inclusion of an instructional assessment establishing the rates at which the student can acquire and retain

the content of the regular education curriculum, *see id.* at § 342.25(j); specific schedules for implementing instruction in self-help, social and communication, basic academic, functional academic, and vocational and adult living skills, *see id.* at § 342.25(b)(2); standards for the constitution of the IEP team that ultimately determines whether the student is disabled and, if so, the nature and extent of special programming required to meet his or her unique needs, *see id.* at § 14.32(c); IEP content requirements that expand upon the content mandated by federal law, *see id.* §§ 14.32(f) and 342.32(d); enumeration of a special education intervention hierarchy describing in detail from least restrictive to most the various means of providing support to children with disabilities, *see id.* at §§ 14.42(e) and 342.42(b) and (c); enumeration of specific categories of special education intervention based upon the primary learning needs of the students in the classroom and establishment of class size and caseload maximums and minimums driven by the type and intensity of special education intervention, *see id.* at § 342.42(i) and (j); prescriptions and proscriptions governing discipline and behavior management techniques, *see id.* at §§ 14.35, 14.36, 342.35, and 342.36; and highly-specific rules governing the placement of students in private schools, *see id.* at §§ 14.42, 342.42 and Chapt. 171.

In addition to regulations and standards,[4] the Pennsylvania Department of Education maintains written policies in the form of "Basic Education Circulars" and "Certification and Staffing Policy Guidelines" governing such topics as the meaning of "specially-designed instruction," adherence to the least restrictive environment mandate, and the scope of professional responsibility of teachers holding special education certification in the Commonwealth. *See* BASIC EDUC. CIRC. 22 PA. CODE § 14.1 (PDE 1997); BASIC EDUC. CIRC. 22 PA. CODE § 342.42(c) (PDE 1997); and CERTIF. & STAFFING POLICY GUIDELINE No. 50 (PDE 1992).[5] The Pennsylvania Department of Education, as SEA, retains the authority to approve or disapprove any special education programming offered by the various school districts, or LEAs, "as to location, constitution, and size of classes, conditions of admission and discharge of pupils, equipment, courses of study, methods of instruction, and qualification of teachers," Public School Code of 1949, Act of Mar. 10, 1949, No. 14, P.L. 30, art. XIII, § 1373, *as amended*, 24 P.S. § 13-1373, although it defines its role as one of "general supervision" over the various school districts to which it

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[4] The examples offered from Pennsylvania's special education regulations and standards are but a small sampling of the many provisions therein which are not specifically required by or anticipated in the IDEA. The regulations and standards contain dozens of additional uniquely Pennsylvanian applications of the special education mandate, both procedural and substantive.

[5] Copies of these policies are attached hereto at App. 15-41.

"delegate[s] operational responsibility," 22 Pa. Code § 14.2(b) and (d).

This IDEA-based SEA-LEA agency theory which is consistent with Congress' legislative authority and design in enacting the IDEA, as embodied in Pennsylvania and elsewhere, underlies OSEP's *inter*state transfer policy every bit as much as it underlies its *intra*state transfer policy. The "imprimatur" of one State certainly must be honored by LEAs within that State but has no effect on another State. In *OSEP Memorandum*, OSEP makes clear at the outset that "when a disabled student moves from State A to State B," the "State B school district is not required to adopt the most recent evaluation and implement the most recent individualized education program (IEP) developed for the disabled student by the State A school district." 24 INDIV. DISABIL. EDUC. L. RPTR. at 321; App. at 2-3. OSEP supports this conclusion by re-stating as follows the "State ownership" analysis first employed to the discussion of intrastate transfers in *Inquiry of Rieser*:

> Under Part B [of the IDEA], each State and its local school districts must make a free appropriate public education (FAPE) available to all resident children with specified disabilities in mandated age ranges, and must ensure that the rights and protections of Part B are afforded to eligible students and their parents. 20 U.S.C. § 1412(2) and (5) [now § 1412(a)(1) and (6)]. FAPE includes, among other elements, the provision of special education and related services, at no cost to the parents, that meets State education standards and Part B requirements, in conformity with an IEP. 34 C.F.R. § 300.8 [re-

> promulgated in the proposed new IDEA regulation as § 300.11, *see* 62 FED. REG. No. 204, at 55070-71 (Oct. 22, 1997)]. Thus, the entitlement to FAPE, by its terms, encompasses an appropriate educational program that is individually-designed for each disabled student in accordance with the requirements of Part B *and the educational standards of the State in which the student's parents reside.* In addition, under 34 C.F.R. § 300.600 [same in the proposed new regulation, *see* 62 FED. REG. No. 204, at 55112-13], *each State* must exercise general supervision over all programs in the State that provide educational services to disabled students, *and must ensure that all such programs meet State educational standards* and Part B requirements.
>
> *. . . Since the State A school district's evaluation and IEP were based in part on the education standards and eligibility requirements of State A, the student's evaluation and IEP developed by the State A school district might not necessarily be consistent with the education standards of State B.*

24 INDIV. DISABIL. EDUC. L. RPTR. at 321 (emphasis added); App. at 3-4. The IDEA thus creates a vertical federal-SEA-LEA relationship that supports intrastate pendency and equally does not support horizontal interstate pendency. The *OSEP Memorandum* on interstate transfers is thus fully supported by the language of the IDEA. The policy limiting interstate pendency is at least as well supported as the policy requiring intrastate pendency. In fact, as noted above and as the Hearing Officer in this case pointed out, nothing in the plain language of the "stay put" provision of the IDEA, which on its face governs only the obligation of the LEA to maintain the then-

current placement of a child during due process hearings under the Act, in any way purports to govern the obligations of LEAs in cases of geographic relocation of the child.

Even under the intrastate pendency policy, which Petitioners asked the Third Circuit, the District Court, the panel and the hearing officer to apply in this case to an interstate transfer, Petitioners are arguably not entitled to the relief they seek. In *Inquiry of Rieser*, OSEP recognized the practical reality that a child who relocates from Erie to Philadelphia cannot literally continue to be educated in the same class at the same street address. Thus, OSEP described the "pendency" obligation of the receiving district in an intrastate transfer as follows:

> When a child moves with his parents to a new school district and as a result the child cannot attend the same school, obviously the Act does not require maintaining the placement in the former school district. However, the LEA must maintain, during the pendency of a dispute, the child's "then current educational placement" by providing the complete program of special education and related services described in the existing IEP. For example, if the child received three hours of speech therapy under his/her existing IEP, then he/she must receive three hours of speech therapy by a speech therapist in the new district. If the educational program option (e.g., residential program, regular class, self-contained class) is so intertwined with the goals and objectives that it is a necessary component of the program described in the IEP, then the new LEA must place the child in that type of placement.

> This is not to say that the new LEA must always educate the child in the same type of setting as used by the previous LEA. This will depend on whether the special education and related services in the existing IEP essentially dictate or pre-determine the type of setting that must be chosen. This will depend on the particularities of each child and IEP.

Rieser, 2 EDUC. HANDICAP. L. RPTR. 211: 403, at 3; App. at 13-14. Even a cursory review of the IEP from the District of Columbia establishes that nothing in the goals, objectives, related services, or the equivalent of specially-designed instruction dictates education at the Hill Top School, the placement unilaterally selected by the parent. To the contrary, the uncontested testimony of Dr. Marianne Price, District Director of Pupil Services, established that the District could have implemented the District of Columbia IEP, with all related services, at Radnor High School. While Petitioners believe that much should be made of the lack of knowledge of the District's Director of Pupil Services regarding the differences between Pennsylvania and District of Columbia special education laws, it is beyond question, according to Congress' legislative authority and design in enacting the IDEA, that each LEA in Pennsylvania has the right and the obligation to assure that it is meeting its obligations according to the unique manner envisioned by the Commonwealth, and described in its state plan which has been approved by the USDE, in fulfilling the requirements under the IDEA.

B. The IDEA and Pennsylvania's Special Education Standards and Regulations

Not only does Petitioners' contention[6] related to Pennsylvania's special education and standards establishing a higher standard for "pendency" than federal law fail to establish a compelling reason for this Court to exercise its discretion, their assertion that Pennsylvania has a higher "pendency" standard than is required by federal law and that that more liberal standard should be construed to apply to interstate transfers, is baseless. There is no mention whatsoever of interstate transfers anywhere in either the Pennsylvania standards or the Pennsylvania regulations. Not only do the 1990 standards and regulations fail to extend "pendency" law beyond the status in which it existed by statute, regulation, and decision at the time, those standards and regulations are the product of a Commonwealth in which the articulated policy through July of 1986 was not to apply pendency even to *intra*state transfers, *see Inquiry of Rieser*, 2 EDUC. HANDICAP. L. RPTR. 211: 403, at 1; App. at 8.

For the foregoing reasons, Petitioners cannot establish, on the uncontroverted facts of this case, that the actions of the District in August of 1997 and during the first six weeks of the 1997-1998 school term violated the

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[6] The District is responding to the contention related to a higher standard for pendency according to Pennsylvania law notwithstanding the fact that while this issue was raised as a question for this Court, it was not briefed in the petition for writ of certiorari.

IDEA. Therefore they have failed to establish a compelling reason for this Court to exercise its discretion to review the Third Circuit's decision that

> [B]ecause Congress left primary responsibility for providing a FAPE and for implementing the IDEA to the states, we believe it unlikely that Congress intended the stay-put provision, which dates back to 1975 and the IDEA's predecessor statute, to impose a requirement on states that they must implement an IEP established in another state without considering how consistent that IEP is with the policies and mandates of the student's new residential state.

Judgment of the United States Court of Appeals for the Third Circuit, dated January 14, 2000, Appendix to Petition to Writ of Certiorari at 22a.

II. The Constitutionally Protected Right to Interstate Travel Did Not Require the District to Implement an Out-of-State IEP.

Petitioners assert that the refusal of the District to place the student in the private school of the parent's choice immediately upon their relocation to Pennsylvania, and the insistence on the part of the District that it conduct an evaluation and develop an IEP in accordance with Pennsylvania law prior to committing to any program and placement other than an interim one, impaired their constitutionally protected "right to interstate travel." Petitioners cite and rely heavily upon the recent decisions of this Court in *Saenz v. Roe*, 526 U.S. 489, 119 S.Ct. 1518, 143 L.Ed.2d 689 (1999) (involving relocation from Colorado, Louisiana, and Oklahoma to California),

and the Third Circuit in *Maldonado v. Houstoun*, 157 F.3d 179 (3d Cir. 1998), *cert. denied*, 526 U.S. 1130, 119 S.Ct. 1802, 143 L.Ed.2d 1007 (1999) (involving relocation from Puerto Rico to Pennsylvania) in support of the proposition that movement into a new State of residence should not result in the receipt of lesser benefits than those enjoyed by current residents of the State. Their reliance on these cases in the instant matter is ill-founded. At issue in both the *Saenz* and *Maldonado* cases were welfare benefits legislation requiring, among other things, that a family, relocating to State A from State B[7] who qualified for cash assistance in State A, receive during its first twelve months of residency in State A the lesser of: (1) the benefit level available to similarly situated State A residents of twelve months or more, or (2) the benefit level the family would have been eligible to receive in State B had they not moved to State A. *See Saenz*, 526 U.S. at 492-95, 119 S.Ct at 1521-22; *Maldonado*, 157 F.3d at 182.

The issue thus confronting the *Saenz* and *Maldonado* courts was the constitutionality of employing a durational residency criterion to limit the amount of a benefit for which the recent residents in question had qualified using the new state of residency eligibility criteria. *See Saenz*, 526 U.S. at 496-97, 119 S.Ct at 1523; *Maldonado*, 157 F.3d at 183. The plaintiffs in *Saenz* and *Maldonado* were not seeking what Petitioners in effect are seeking in the present case, to impose upon Pennsylvania officials an

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[7] For purposes of this analysis, the District uses the term "State" to mean each of the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, and each of the outlying areas.

eligibility determination and benefits status established in another State. The *Saenz* and *Maldonado* plaintiffs entered the new States of residency, applied and were determined to be eligible for benefits, and sought only to obtain those benefits which a twelve-month resident who had done the same would have received. *See Saenz*, 526 U.S. at 496-97, 119 S.Ct. at 1523; *Maldonado*, 157 F.3d at 183. In Pennsylvania, all students evaluated and placed in special education for the first time must submit to the Pennsylvania multidisciplinary team evaluation and IEP team process, regardless of the duration of their residency. Petitioners here, by contrast, entered Pennsylvania for the first time and sought to force upon a Pennsylvania school district, prior to completion of the mandated multidisciplinary team evaluation and IEP team process, acceptance of their unilaterally obtained approximation of the benefits provided by the District of Columbia. In doing so, Petitioners sought and continue to seek a greater benefit under the IDEA than a longer-term Pennsylvania resident could possibly receive as it relates to pendency at the expense of all the other standards established by the Commonwealth of Pennsylvania for its implementation of the IDEA.

The District recognizes, of course, that the decision of the parent in this case to relocate to Pennsylvania deprived the student of continued placement at the Lab School in the District of Columbia. The parent might well have believed, moreover, that placement in Hill Top would ease somewhat the hardship caused by the relocation. The constitutional right to travel, however, is not tantamount to a guarantee that the effects of interstate travel will be painless. The Third Circuit considered this

reality of interstate relocation in a decision concerning a challenge to a Pennsylvania bar admissions rule restricting the ability of attorneys from other States to practice law upon relocating to Pennsylvania. The Court offered the following analysis in rejecting the challenge:

> This is not to say that [the Rule in question] is no impediment to plaintiffs' freedom of movement. Surely, the Rule has some deterrent effect on nonresident attorneys who wish to migrate to Pennsylvania but choose not to because they are ineligible to sit for the Pennsylvania bar examination. However, the Constitution does not guarantee that citizens of State A may move to State B and enjoy the same privileges they did as citizens of State A, only that citizens of State A may move to State B and be treated on similar terms as the citizens of State B. *See Toomer v. Witsell*, 334 U.S. 385, 395, 68 S.Ct. 1156, 1161-62, 92 L.Ed. 1460 (1948) (construing U.S. Const. Art. IV, § 2). Nor does it "require that because a lawyer has been admitted to the bar of one State, he or she must be allowed to practice in another." *Leis v. Flynt*, 439 U.S. 438, 443, 99 S.Ct. 698, 701, 58 L.Ed.2d 717 (1979) (per curiam).

Schumacher v. Nix, 965 F.2d 1262, 1267-68 (3d Cir. 1992), *cert. denied*, 507 U.S. 908, 113 S.Ct. 1252, 122 L.Ed.2d 651 (1993). The Third Circuit thus recognized that differences in State laws can have a deterrent effect on the decision to move interstate without offending the constitutional proscription against restrictions on interstate travel, as long as the law bears a rational relationship to some legitimate state purpose. *Id.*

Even if this Court were to apply the compelling interest standard suggested by Petitioners, however, the

Court should still affirm the decision of the Third Circuit. The application of the law in the manner supported by the Court of Appeals created no distinctions between the student as a new resident of the District and other Pennsylvania residents. The student was entitled to a Pennsylvania evaluation and a Pennsylvania-approved IEP, and had the student relocated to Erie, Pennsylvania rather than New Jersey, he would have taken with him the right to have that Pennsylvania IEP implemented by the Erie School District. This rule serves both the compelling state interest as well as the legitimate purpose of the IDEA in assuring that every child residing in Pennsylvania, whether newly arrived or indigenous, is evaluated by Pennsylvania trained and certified professionals and has a program based thereon developed by Pennsylvania teachers familiar with Pennsylvania practice and procedure for implementation in Pennsylvania schools. Indeed, the implementation of the *OSEP Memorandum*, with which the District more than complied, actually afforded the student greater rights than a similarly-situated Pennsylvania resident would have enjoyed. A newly referred Pennsylvania resident without a Pennsylvania-developed IEP establishing his need for special education and related services would have had to remain in regular education with no supports pending the completion of an evaluation and IEP team meeting. The Petitioner student, upon entering Pennsylvania also without a Pennsylvania-developed IEP, was offered special education services, following an IEP team meeting to which his parent was invited, without waiting. *OSEP Memorandum, reprinted in* 24 INDIV. DISABIL. EDUC. L. RPTR. at 321; App. at 3-5.

For the foregoing reasons, Petitioners cannot establish, on the uncontroverted facts of this case, that the actions of the District in August of 1997 and during the first six weeks of the 1997-1998 school term violated the right to interstate travel.

CONCLUSION

For the foregoing reasons, the District respectfully requests that this Court reject the Petition for Writ of Certiorari of Michael C. and Stephen C.

Respectfully submitted,

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24 IDELR 320

OSEP Memorandum 96-5 (Interstate Transfers)

Office of Special Education Programs

December 6, 1995

Thomas Hehir Director Office of Special Education Programs

- Evaluations, Evaluation Generally
- Individualized Education Program (IEP), In General
- Placement, Change in Residence
- U.S. Department of Education, Office of Special Education Programs (OSEP)

Summary

OSEP issued a policy guidance outlining the procedures to be followed by states and school districts when students with disabilities transfer interstate. As a preliminary matter, OSEP cautioned that although Part B does not require that the latest evaluation and IEP developed by the student's former school district in another state (A) be adopted by the school district in the new state (B), the student's rights must not be compromised during the transfer process. District B's first step is to determine whether to adopt the most recent evaluation and IEP. As part of that process, it must ascertain whether a disability exists and whether the evaluation and IEP comply with the state's education standards and Part B. If it accepts the determination that the student is disabled and the evaluation, it must notify the student's parents as required by Part B. The former IEP can be adopted and an IEP

meeting does not have to be held if the former IEP is available, the parents agree to its use, it can be implemented, and it is appropriate. If the former IEP is refused by the new district or the parents, an IEP meeting must proceed in accordance with Part B timelines. If the former evaluation is rejected by the new district, an evaluation must be conducted "without undue delay." The parents must receive notice, as well as consent – as it is treated as a preplacement evaluation. During the evaluation, the student should be placed pursuant to an agreed-upon interim IEP, or in regular education in absence of such an agreement. After the evaluation, Part B's procedures for developing an IEP should be followed. Due process is available for parents who disagree with proposed evaluations and IEPs, and pending a due process request, the student can be placed in any mutually agreed-upon placement. However, if no mutually agreeable placement can be determined, the district is not obligated to adopt the former IEP or provide the former services. In that situation, placement should be regular education pending the resolution of the placement dispute in accordance with 34 CFR 300.513(b) of Part B's stay-put provision.

The Department has received a number of requests for clarification of the requirements of Part B of the Individuals with Disabilities Education Act (Part B) that are applicable when a disabled student moves from State A to State B (referred to as an interstate transfer). Although it is our conclusion that, under Part B, the State B school district is not required to adopt the most recent evaluation and implement the most recent individualized

education program (IEP) developed for the disabled student by the State A school district, State B and its responsible school district must ensure that the rights of the disabled student and his or her parents are not compromised when an interstate transfer occurs. The following guidance should assist States and school districts in safeguarding the rights of disabled students and their parents in interstate transfer situations.

Under Part B, each State and its local school districts must make a free appropriate public education (FAPE) available to all resident children with specified disabilities in mandated age ranges, and must ensure that the rights and protections of Part B are afforded to eligible children and their parents. 20 U.S.C. § 1412(2) and (5). FAPE includes, among other elements, the provision of special education and related services, at no cost to the parents, that meets State education standards and Part B requirements, in conformity with an IEP. 34 CFR § 300.8. Thus, the entitlement to FAPE, by its terms, encompasses an appropriate educational program that is individually-designed for each disabled student in accordance with the requirements of Part B and the education standards of the State in which the student's parents reside. In addition, under 34 CFR § 300.600, each State must exercise general supervision over all programs in the State that provide educational services to disabled students, and must ensure that all such programs meet State education standards and Part B requirements.

When a student moves from a school district in State A to a school district in State B, the State B school district first must ascertain whether it will adopt the most recent evaluation and IEP developed for the student by the State

A school district. Since the State A school district's evaluation and IEP were based in part on the education standards and eligibility requirements of State A, the student's evaluation and IEP developed by the State A school district might not necessarily be consistent with the education standards of State B.[1] Therefore, the State B school district must determine, as an initial matter, whether it believes that the student has a disability and whether the most recent evaluation of the student conducted by the school district in State A and the State A school district's IEP meet the requirements of Part B as well as the education standards of State B. If the State B school district accepts State A's determination that the student has a disability and adopts the State A school district's evaluation, the school district in State B must provide notice to the students' parents in accordance with 34 CFR § 300.504(a).

The school district in State B also could elect to implement the most recent IEP developed by State A's school district, provided that it determines that this IEP meets Part B requirements and State B's education standards. The school district in State B would not be required to conduct another IEP meeting if a copy of the current IEP is available, the parents indicate that they are satisfied with that IEP, and the school district in State B believes that the IEP is appropriate for the student and that it can implement that IEP. Appendix C to 34 CFR Part

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[1] When a disabled student changes school districts in the same State, the Part B requirements are different. For a discussion of the Part B requirements that govern inter-district transfer situations, *See EHLR* 213:265.

300 (question 6). However, if the parties are not satisfied with the IEP developed for the student by the school district in State A, an IEP meeting would have to be conducted without undue delay, but in no case later than 30 calendar days after the date that the school district in State B determined that it would accept the State A school district's eligibility determination and evaluation. Appendix C at question 6; See also 34 CFR § 300.343(c).

If the school district in State B elects not to adopt the State A school district's evaluation of a student who transfers into its jurisdiction, the school district in State B must evaluate the student without undue delay and provide proper notice to parents. 34 CFR §§ 300.128, 300.220 and 300.504(a). The evaluation would be treated as a preplacement evaluation of the student under 34 CFR § 300.531, and the school district in State B must obtain parental consent under 34 CFR § 300.504(b)(1)(i) before conducting this evaluation. While the evaluation is in process, the school district in State B could serve the student in a special education placement in accordance with an interim IEP unless the parents and State B school district are unable to agree on an interim placement, in which case, the student would be placed in the regular school program. Once the school district in State B completes the student's evaluation, an IEP meeting must be convened without undue delay, but in no case later than thirty calendar days after the date of the eligibility determination. 34 CFR § 300.343(c). At this IEP meeting, the State B school district must develop and adopt an IEP for the student that addresses his or her unique educational needs.

If the student's parents disagree either with the State B school district's evaluation or the IEP proposed for the student by the State B school district, they could initiate an impartial due process hearing under 34 CFR § 300.506. During the pendency of the hearing, the student could be placed in the program proposed for the student by the State B school district, with the parents' agreement, or in another placement on which the parents and State B school district agree. However, if the parents do not agree to place the student in the program proposed by the State B school district and no other interim placement can be agreed upon, the State B school district is not required to implement the IEP developed for the student by the school district in State A, or to approximate the services contained in the State A school district's IEP during the pendency of authorized review proceedings. Rather, in such a situation, the State B school district would place the student in the regular educational program in accordance with 34 CFR § 300.513(b).

We trust that the above policy will assist officials of your State and local school districts in interstate transfer situations and will serve to limit unnecessary interruptions in the provision of needed instruction and services to disabled students. Further questions can be directed to the contact person listed in this memorandum or to Dr. JoLeta Reynolds at (202) 205-5507.

211:403

Rieser, Letter to (Assessment)

Office of Special Education Programs

Leonard Rieser, Education Law Center, Inc., 2100 Lewis Tower Building, 225 South 15th Street, Philadelphia, PA 19102

[Editorial Note: See 2 EHLR 211:354 for earlier correspondence with OSEP and 1978-85 Section 504 Rulings 257:534 for related OCR Complaint Letter of Finding.]

Digest of Inquiry

When a student moves from one school district to another within the same state, may the receiving school district refuse to implement the IEP developed by the sending school district even if the parents object to such a change in program?

Digest of Response

When a student moves from one school district to another within the same state, the receiving school district must implement the IEP developed by the sending school district including "elements of placement that are inherent in the IEP" during the pendency of proceedings.

Text of Inquiry

On May 24, 1984 ___ nearly two years ago ___ I filed a complaint with the Office of Special Education Programs concerning Pennsylvania's policy on inter-district transfers of special education students. Basically, the complaint is that, when a student moves from one school district to another, the "new" district is not required to implement the student's Individualized Education Program (IEP) *even pending its reevaluation of the student and/or revision of his or her program*. On the contrary, according to the state's policy, the parent must either accept whatever changes the new district unilaterally makes in the child's program, or have the child placed in regular education. I need hardly add that for most parents of handicapped children this is no choice at all, since returning the child to a regular class is usually a complete impossibility.

Since filing the complaint, I have made the following inquiries concerning its status:

1. August 17, 1984: I wrote to Dr. Wendy Cullar about the status of the matter and received no reply.

2. December 20, 1984: I again wrote to Dr. Cullar who wrote back to inform me that I would be notified as soon as a decision on the complaint was reached.

3. April 17, 1985: Dr. Shirley Jones informed me that the complaint was still awaiting decision but was "next up" for consideration.

4. November 14, 1985: I wrote to you concerning the matter. Due to some mix-up, your reply (dated November

21) pertained to a different case. I wrote again on November 26.

5. January, 1986: I spoke with Ms. Patricia Guard about the status of the matter; she indicated that a decision should be forthcoming shortly.

In addition, I have had many telephone conversations with various other members of your staff concerning the matter.

I appreciate the courteous responses that I have received in response to my inquiries. However, I am also concerned with obtaining a decision for my clients, to whom this is an important issue that can have a significant effect on their children's lives.

Under the Education of the Handicapped Act, the Department has a *duty* to ensure that state plans and policies concerning special education conform to the Act's requirements. 20 U.S.C. Sec. 1413(c). In my view, therefore, the Department is required to act on this complaint. As we approach the two-year mark, I again request that action be taken. I hope that a decision will be reached promptly and that we will not need to pursue the matter further.

Thank you for your assistance.

Text of Response

I am writing in response to your letter of April 25, 1986 and your earlier letters on the issue of what special education and related services are to be provided, pending a resolution through a due process proceeding, to a handicapped child who moves from one school district to

another within a State. In your May 24, 1984 letter, you asked "whether, if the 'new' district proposes to change the child's IEP [individualized education program] and the parent objects to such change, the existing IEP must be implemented during the pendency of any reevaluations of the child and any administrative and/or judicial proceedings." As described below, the Office of Special Education Programs (OSEP) concludes that, during the pendency of proceedings when a child moves from one local educational agency (LEA) to another within a State, the new or "receiving" LEA must implement the IEP developed by the previous LEA, including elements of placement that are inherent in the IEP.

The Education of the Handicapped Act (EHA), at 20 U.S.C. Sec. 1415(e)(3), states:

> During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

This is stated in similar fashion in the regulations implementing EHA, at 34 CFR 300.513.

The statute and regulations distinguish between "initial admission to a public school" and all other situations. In the situation raised in your letter, the child had previously been evaluated and found to be handicapped within the meaning of EHA, and had been provided

special education pursuant to an IEP. We conclude that the child's arrival at a new LEA does not constitute an initial admission to a public school and that the "initial admission" portion of the statute is not applicable here. The purpose of the initial admission provision is to ensure that children applying to a public school for the first time will not be required to remain outside of school pending completion of the review process. Without this provision the remaining part of 20 U.S.C. Sec. 1415(e)(3) would require the child applying for initial admission to remain outside of public education. The purpose and language of the initial admission provision is inapplicable here, because the child has in fact been educated in another public school district in the State. In *McCowen v. Hahn*, (ND IL 1981) 1981-82 EHLR DEC. 553:131, 134 the court states, "to construe 'initial admission' as anything other than the child's first admission to a public school program would render the word 'initial' superfluous."[1]

Because the transfer from one Pennsylvania LEA to another is not an initial admission, the statute requires that the child's "then current educational placement" be

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[1] This is consistent with previous OSEP statements. In a June 17, 1980 letter, OSEP stated:

> "Initial placement" is not defined either in the statute or the Part B regulations. This Office has interpreted this term to mean that a child is entering special education for the first time. 2 EHLR DEC. 211:212, 215 (1980). Therefore, if a child changes school districts, OSEP has advised the States that the type of consent required in the use of an initial placement is not required.

maintained. Congress, by enacting the pendency provision, has expressed a clear preference for the status quo. *Doe v. Brookline School Committee*, 722 F.2d 910, 915 (1st Cir. 1983). To allow a new LEA to place the child in a regular education program or provide an interim IEP without parental consent would defeat the purpose of the statutory provision ___ "to guarantee a coherent educational experience for a disabled child until conclusion of review of a contested IEP." *Id.* In *Tokarcik v. Forest Hills School District*, 665 F.2d 443, 453 (3rd Cir. 1981), *cert. den.*, 458 U.S. 1121 (1982), the Third Circuit observed, "Section 1415(e)(3) at a minimum guarantees that the most recently agreed upon program cover any unresolved interim" pending challenge to an existing IEP.

The phrase "then current educational placement" is not defined by the statute or the regulations. As used in varied contexts throughout the regulations, however, "educational placement" encompasses at least three components. The first component is the educational program option which involves the type of placement, for example, a residential program or a regular class or self-contained class. The second component is the educational program contained in the IEP including annual goals, short-term objectives and related services. The third and final component is the specific school or facility which the child attends. These are also the ingredients in the "status quo" which the courts interpreting the statute have required be maintained during the pendency of proceedings.

In the situation raised in your letter, these components of placement are found in, or are based on, an IEP developed with the participation of the parents by the

previous LEA. That LEA, like the receiving LEA, is an agent of the Commonwealth of Pennsylvania's State educational agency (SEA). The SEA is the grantee of EHA funds, and is charged with the responsibility of ensuring the provision of a free appropriate public education through LEAs and other institutions. Once an IEP is developed in an LEA and the IEP is subject to whatever degree of administrative and judicial proceedings the parties elect to pursue, the IEP has the imprimatur of the SEA and carries a presumption of correctness, subject to formal revision as provided in the statute. This does not change when a child moves from one Pennsylvania LEA to another.

When a child moves with his parents to a new school district and as a result the child cannot attend the same school, obviously the Act does not require maintaining the placement in the former school district. However, the LEA must maintain, during the pendency of a dispute, the child's "then current educational placement" by providing the complete program of special education and related services described in the existing IEP. For example, if the child received three hours of speech therapy under his/her existing IEP, then he/she must receive three hours of speech therapy by a speech therapist in the new district. If the educational program option (*e.g.*, residential program, regular class, self-contained class) is so intertwined with the goals and objectives that it is a necessary component of the program described in the IEP, then the new LEA must place the child in that type of placement.

This is not to say that the new LEA must always educate the child in the same type of setting as used by

the previous LEA. This will depend on whether the special education and related services in the existing IEP essentially dictate or pre-determine the type of setting that must be chosen. This will depend on the particularities of each child and IEP.

In summary, we conclude as follows: When a handicapped child transfers from one school district to another within a State, the receiving LEA must maintain the child's "then current educational placement" during the pendency of any reevaluation or administrative and judicial proceedings. EHA does not require maintaining the placement in the former school district. However, the new LEA must provide the complete program of special education and related services as described in the child's IEP, including the goals and objectives and the educational program option if that type of placement (*e.g.*, regular class, self-contained class, residential placement) is so intertwined with the goals and objectives that it is a necessary component of the program described in the IEP.

Thank you for bringing this matter to our attention. We hope you find this information helpful.

Patricia J. Guard
Acting Director
Office of Special Education Programs

BEC-Specially Designed Instruction

Basic Education Circular

SUBJECT: Specially Designed Instruction
22 Pa. Code Section 14.1

DATE OF ISSUE: September 1, 1997

DATE OF EXPIRATION: June 30, 2000

This BEC was last revised prior to June 4, 1997, the date on which the Individuals with Disabilities Education Act (IDEA) was amended (P.L. 105-17). Therefore, the advice herein may not be consistent with current federal law. Consequently, school districts and their solicitors should check the underlying statutory law, and be responsive to concerns raised by parents and their advocates. This material is being reviewed for necessary revisions as provisions of the law are phased into effect and regulations are promulgated. If specific concerns arise, please call the Contact Bureau/Office listed on this BEC.

This Basic Education Circular clarifies the Department's position on specially designed instruction as part of special education. Although 22 Pa. Code Chapters 14 and 342 do not define it in detail, specially designed instruction is a major element of the general definition of special education at Section 14.1:

> Special education – Specially designed instruction to meet the needs of an exceptional student, including specifically designed instruction that is the following:

(i) Conducted in the classroom, in the home, in community settings, in hospitals, in institutions and in other settings.

(ii) Provided in an instructional or skill area, including physical education, speech and vocational education.

Specially designed instruction consists of adaptations or modifications to the general education curriculum, instruction, instructional environments, methods, or materials for exceptional students. It may also include a life skills curriculum for students with moderate to severe disabilities. Such specially designed instruction must go beyond the services and programs that a student would receive as part of general education, and must be designed to meet the unique needs of the student.

Specially designed instruction is a required field on early intervention and school age Individualized Education Program (IEP) formats. The Bureau of Special Education has included an appropriate item in its compliance monitoring instrument to assure the existence of specially designed instruction on the IEPs.

Under Section 14.1, students are identified as exceptional when they have a disability or are gifted and, therefore, need special education. Thus, specially designed instruction is the special education which a student needs. Exit criteria, which is a required field in IEPs under Section 342.32(d)(5), is objective criteria by which it may be determined that a student is no longer in need of the specially designed instruction noted in the IEP.

REFERENCES:

State Board of Education Regulations

22 Pa. Code Chapter 14

Department of Education Standards

22 Pa. Code chapter 342

Federal Statutes

20 USC 1400 et seq., (IDEA)

Federal Regulations

34 CFR Part 300

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BEC-Inclusion of Special Education Students

Basic Education Circular

SUBJECT: Inclusion of Special Education Students 22 Pa. Code Section 342.42(c)

DATE OF ISSUE: September 1, 1997

DATE OF EXPIRATION: June 30, 2002

This BEC was last revised prior to June 4, 1997, the date on which the Individuals with Disabilities Education Act (IDEA) was amended (P.L. 105-17). Therefore, the advice herein may not be consistent with current federal law. Consequently, school districts and their solicitors should check the underlying statutory law, and be responsive to concerns raised by parents and their advocates. This material is being reviewed for necessary revisions as provisions of the law are phased into effect and regulations are promulgated. If specific concerns arise, please call the Contact Bureau/Office listed on this BEC.

SUMMARY

The term "inclusion" has become common in discussions of the placement of special education students, but the term has no legal definition. The term denotes the "least restrictive environment" rules that have been part of the special education law for close to two decades. The term also connotes an emphasis on active social membership in a class or community, and carries with it a need for teacher training and school district preparation. The

term "inclusion" does not represent a legal requirement that every child be educated in the same way or in the same place.

With this working definition in mind, PDE supports inclusion. PDE supports inclusion because it is essentially a restatement of well established law, and because it represents sound educational practice for large numbers of students with disabilities. PDE supports inclusion through personnel training and technical assistance, through the development of local capacity to include students successfully, and through the Department's general supervision of special education in the Commonwealth.

DISCUSSION

A. Quality and Location

Special education is a service, not a place. The purpose of special education parallels the purpose of elementary and secondary education as a whole: to prepare children to lead productive independent lives as citizens and members of an adult community. Exceptional students often need exceptional interventions, so that they may eventually lead regular lives to the greatest extent possible. Thus, special education services remain highly valued.

As we strive to maintain and improve the quality of special education services, there is increasing emphasis on where we provide special education. This is as it should be. The degree of "integration" or "inclusion" is important for two reasons. First, contact with nondisabled peers can have positive social effects both on

children with disabilities and on their typical classmates. Second, education with nondisabled peers can have positive learning effects. For many, the result is that children with disabilities learn more in inclusive environments.

B. Terminology

The terminology surrounding the issue has evolved as it has become part of our popular culture. Terms such as "mainstreaming," "least restrictive environment," "integration" and "inclusion" each have different connotations. As the Department uses it, the term "inclusion" implies more than ensuring the mere physical proximity between students with and without disabilities. It connotes a full participation and equality as part of a group, leading to a sense of belonging within the community at large. Inclusion does not necessarily mean that a student never leaves the class or the group of students of which he or she is a part. It means, rather, that a student is truly a member of, not merely a visitor to, the class or group. As the Department uses the term, "inclusion" is synonymous with what is sometimes called "supported inclusion," because the term implies that the student and teacher will receive the supports they need.

The term "full inclusion" is also heard, and used by some to mean the inclusion of every student with a disability in a regular classroom, without exception. Neither the law nor the Department takes such an absolutist approach. The law requires educators to provide more than a "one size fits all" placement option. In order to ensure that all needs are met, a continuum of placements

that vary in their restrictiveness is required. That continuum exists in Pennsylvania; there is a rich enough supply of diverse programs in Pennsylvania that a greater dispersion of sound inclusive or integrative practices does not threaten the loss of alternative placement options.

More to the point is the observation made by many Pennsylvanians that whether a child with a disability is placed in a regular classroom depends in part on the school district in which the family lives. Although examples of successful inclusive practices can be found across the Commonwealth, districts appear to vary in their current capacity to make all of the necessary services available in the regular classroom.

Our experience suggests that very similar children are integrated with supports into regular classes in some schools but not in others. While we know that children vary, it is reasonably clear also that the school districts are frequently the controlling variable in deciding whether more integrated or more segregated special education placements will be made. This is not appropriate; in some cases, it is of questionable legality. An uneven distribution of inclusive practices and policies is more important to the Department and to Pennsylvania's families than a theoretical discussion about absolutes that does not sufficiently recognize individual differences.

There are a number of myths or misconceptions concerning inclusion that should be dispelled:

- Inclusion is not a new legal requirement. The legal requirements of inclusion are the "least restrictive environment" requirements that have been in place for close to two decades.

– Inclusion is not a mandate that all children with disabilities be educated solely in the regular classroom. The law still requires that educators have available a continuum of alternative placements to suit diverse needs.

– Inclusion is not designed to save money. Often, inclusion may be less expensive or may equal the cost of alternative placements; but this is neither its purpose nor a necessary result.

– Inclusion is not a dumping of students in a regular class without special supportive services. Special services, referred to in law as "supplementary aids and services," are at least as important to student with disabilities in regular classes, if not more important, than such services are to students with disabilities in segregated settings.

– Inclusion is not a procedure for leaving a regular classroom teacher with greater challenges and no increase in resources. The needs of the special education student in an inclusive placement will not decrease, at least in the short run. Therefore, the responsibilities of the regular classroom teacher will often increase, thus increasing the need for training, consultation, collaborative planning time, paraprofessionals, and continuous communication between classroom teacher and special education specialist. The Department's approach to special education recognizes the need for training both special and regular education teachers, in 22 Pa. Code Section 342.7(c). For inclusion to work well, it is important for the classroom teacher to have regular access to special education specialists and other support staff who can help the teacher

devise and deliver the supports and modifications that will permit all of the children in the class to benefit.

– Inclusion does not mean that special education students must have the same curricular goals as all other students. Our expectations for students with disabilities may be higher than has traditionally been the case, but the curriculum and the goals for students with disabilities in the regular classroom can (and often should) be different than the curriculum and goals for other students in the class.

C. Basis in Law

The legal underpinning for what we call inclusion is not new and is essentially unchanged. From a legal perspective, the core of the matter is the set of similar "least restrictive environment" requirements in statutes and regulations at the state and federal level. According to Pennsylvania's regulations and standards, at 22 Pa. Code Section 342.42(c):

(1) Exceptional students, including students in public or private institutions or other care facilities, shall be educated to the maximum extent appropriate with students who are not exceptional.

(2) The removal of exceptional students from the regular educational environment shall occur only when the nature or intensity of the exceptionality is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

D. Basis in Sound Educational Practice

The most important limit on the extent to which inclusion is appropriate is the ability of the educational profession to plan for a particular child in a regular class. The ability of the profession to succeed with students with disabilities has increased dramatically in recent years. Inevitably, some of us are ahead of others in acquiring the skills and attitudes necessary to succeed with students with disabilities through inclusive practices. The most demanding part of the legal standard, however, is that each school district must become prepared to do what the profession as a whole is capable of doing in the area of inclusion. For example, the Department understands the law as not respecting an argument that "Even if the school district over there can do it, my school district cannot." Nor do the courts permit teachers to refuse to implement an agreed-upon individualized education program.

In the area of inclusion, there is a demanding relationship between law and practice. That is: We in the teaching profession determine, through our actions, the outer limits of what we can practice successfully; but once success in inclusion is achieved somewhere in the profession, the law virtually requires that this increased capability be replicated throughout the field.

E. The Planning Process

Inclusion frequently requires planning and a reallocation of resources by a school district, but it is not something that must be earned by the student. The "least

restrictive environment" rules establish a preference for educating students with disabilities in the regular class. Consideration of the regular class must be the starting place for any decision-making about the placement of any special education student. This is both the law of the land and the policy of the Department. The preference creates a rebuttable presumption that the student will be educated in the regular class. The presumption is rebutted only if it is objectively determined that no set of services can feasibly be established to allow the child to succeed in the regular class. The courts have said that, in making this determination, factors such as class disruption, distortion of the curriculum for the class as a whole, and cost can be taken into account. It appears from the court decisions, however, that these factors will override the positive factors relating to the benefit to the child only in relatively rare cases. Thus, the benefits of inclusion to the child with a disability are the primary consideration, but not the only consideration.

An inclusive placement is not dependent on a demonstration or prediction that there will be an incremental or additional benefit from inclusion. A child need not prove his or her way into a regular class or regular school building. Rather, the "benefits" test is simply whether an appropriate education can be provided in the regular environment. In order to assess whether appropriate educational benefits can be provided in a regular class or other environment, one must look at that environment in two ways: (1) as it is, and (2) as it might be when augmented with supplementary aids and services. Thus, the fact that a child might not be able to succeed in a class as it is does not mean that inclusion is not feasible. The

feasibility of inclusion is to be assessed in light of the services that can be brought to the child. Many services are portable. That is, it is possible to bring them to the child rather than removing the child to the service. Professional judgments as to what services are portable are thus important when considering whether a child is to be included or removed from the regular education environment. Those judgments are to be made, in the first instance, on a case-by-case basis by local school district IEP teams that include the child's parents.

F. Capacity-Building

The phrase "supplementary aids and services" incorporates all of the modifications and innovations of which a school district is reasonably capable. This covers a wide variety of techniques. Implementing these techniques in order to facilitate inclusion is both legally required and desirable. Therefore, it is the policy of the Department to assist school districts and others in building a capacity to implement effective aids, services, and modifications to enable students with disabilities to succeed in regular settings. The Department recognizes the importance of this capacity-building effort because, as mentioned above, Pennsylvania educators inevitably differ in their acquisition of the skills necessary to make inclusion work for increasing numbers of students. Integration without the necessary teaching skills is of course not the goal.

The Department does not believe that mindless, unplanned integration is notably superior to mindless, unplanned segregation. Rather, the Department believes that skilled and thoughtful inclusion for increased

numbers of Pennsylvania children with disabilities is both a legal requirement and a proper educational goal.

This goal is not beyond our collective reach, but requires a commitment to taking advantage of, and learning from, those who have been successful. To assist in this process, the Department continues to operate the Instructional Support System of Pennsylvania (ISSP), which includes a number of initiatives for teacher training and capacity-building.

The Department supports these initiatives because the Department perceives that inclusion is as much about teachers and administrators as it is about students. This kind of effort is also a legal requirement, in federal regulations at 34 CFR Section 300.555(b). Children do not have to prove that they are "ready" for inclusion; the adults who provide educational and related services in Pennsylvania, however, may have to increase their capacity to use effective techniques for making successful inclusion generally available. From a legal perspective, a lack of teacher training is unlikely to constitute a successful defense in any conflict over inclusion. Teacher training and technical assistance, however, is an important part of the Department's approach to inclusion.

Technical assistance cannot be successful if the recipient does not desire the assistance. Thus, the attitudes of local school boards, school administrators, and teachers will be powerful factors in determining whether we meet our respective legal obligations. The Department seeks a willing partnership with local boards, administrators, and teachers in building our collective capacity to serve children well in their neighborhood schools and regular

classrooms. Without a meaningful partnership, the Department's primary mechanism for progress would be limited to monitoring and compliance activities. These activities, however valuable, should not be our primary way of making progress.

G. Conclusion

The courts and the Department want the same things:

– individualized planning using the full potential of the MDT and IEP processes;

– recognition of particular educational, social, and communications needs of individuals and groups, and a recognition of how natural social interaction and effective communication makes educational achievement more likely;

– a careful analysis of needed services, for the purpose of determining whether those services are sufficiently "portable" to be included as part of a regular class placement;

– organization of schools so that classroom teachers have the training and support needed to allow the classroom teacher and the students to succeed;

– education in the regular classroom whenever possible, and a full continuum of alternative placements for those cases in which students cannot succeed even in enhanced regular classes; and

– an application of the successful practices already being used by some, across an increasing number of schools and school districts.

To accomplish these goals, and thus to implement the least restrictive environment requirements that have long been part of special education law, special education and special educators will continue to be vital, and will evolve as a more unified system of education becomes a reality for more students. A willingness to learn from the successful experiences of others, and a willingness to create one's own success through innovative inclusion programs, will remain crucial. It is the Department's policy to encourage this sense of willingness, and to capitalize on it by fostering the knowledge and the practice of inclusion of students with disabilities in regular settings.

One way for school districts to organize their thinking and planning on this issue, and to assess whether further work is necessary, is to consider the attached "inclusion checklist for your school." We infer from the checklist that its author believes that there are concrete steps that local officials can take to promote inclusion. The Department agrees, and believes that taking such steps is the right thing for Pennsylvania school districts to do, both legally and educationally.

REFERENCES:

State Board of Education Regulations

22 Pa. Code Sections 14.41-14.45

22 Pa. Code Section 14.56

Department of Education Standards

22 Pa. Code Section 342.41-42.46

Federal Statute

20 U.S.C. 1412(5)(B) and 1414(a)(1)(C)(iv), (IDEA)

Federal Regulations

34 C.F.R. Sections 300.550-300.556

Other

Oberti v. Clementon School District, 995 F.2d 1204 (3d Cir.1993)

ATTACHMENT:

An Inclusion Checklist for Your School

CONTACT BUREAU/OFFICE:

Bureau of Special Education
Pennsylvania Department of Education
333 Market Street, 5th Floor
Harrisburg, PA 17126-0333
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AN INCLUSION CHECKLIST FOR YOUR SCHOOL

___1. Do we genuinely start from the premise that each child belongs in the classroom he or she would otherwise attend if not disabled (or do we cluster children with disabilities into special groups, classrooms, or schools)?

___2. Do we individualize the instructional program for all the children whether or not they are disabled and provide the resources that each child needs to explore individual interests in the school environment (or do we tend to provide the same sorts of services for most children who share the same diagnostic label)?

___3. Are we fully committed to maintenance of a caring community that fosters mutual respect and support among staff, parents, and students in

which we honestly believe that nondisabled children can benefit from friendships with disabled children and disabled children can benefit from friendships with nondisabled children (or do our practices tacitly tolerate children teasing or isolating some as outcasts)?

___4. Have our general educators and special educators integrated their efforts and their resources so that they work together as integral parts of a unified team (or are they isolated in separate rooms or departments with separate supervisors and budgets)?

___5. Does our administration create a work climate in which staff are supported as they provide assistance to each other (or are teachers afraid of being presumed to be incompetent if they seek peer collaboration in working with students)?

___6. Do we actively encourage the full participation of children with disabilities in the life of our school including co-curricular and extracurricular activities (or do they participate only in the academic portion of the school day)?

___7. Are we prepared to alter support systems for students as their needs change through the school year so that they can achieve, experience successes, and feel that they genuinely belong in their school and classes (or do we sometimes provide such limited services to them that the children are set up to fail)?

___8. Do we make parents of children with disabilities fully a part of our school community so they also can experience a sense of belonging (or do we give them a separate PTA and different newsletters)?

___9. Do we give children with disabilities just as much of the full school curriculum as they can master and modify it as necessary so that they can share elements of these experiences with their classmates (or do we have a separate curriculum for children with disabilities)?

___10. Have we included children with disabilities supportively in as many as possible of the same testing and evaluation experiences as their nondisabled classmates (or do we exclude them from these opportunities while assuming that they cannot benefit from the experiences)?

This checklist may help school personnel in evaluating whether their practices are consistent with the best intentions of the inclusion movement. Rate your school with a + for each item where the main statement best describes your school and a 0 for each item where the parenthetical statement better describes your school. Each item marked 0 could serve as the basis for discussion among the staff. Is this an area in which the staff sees need for further development? Viewed in this context, an inclusive school would not be characterized by a particular set of practices as much as by the commitment of its staff to continually develop its capacity to accommodate the full range of individual differences among its learners.

NOTE: The checklist is reproduced from an article by Joy Rodgers in the May 1993 Research Bulletin of the Center for Evaluation, Development, and Research, Phi Delta Kappa, Bloomington, Indiana.

CSPG-50, Special Education Certification-Corrected

CSPG No. 50 (Corrected April 16, 1992)
Page 1 of 5
April, 1992

Special Education Certification and Assignment Scope (K-12)

General Information

Chapter 5, 22 Pennsylvania Code, Curriculum Regulations, provides the planned course as the basic format by which all developed curriculum is recorded for each school entity. Chapter 14, Special Education Regulations, provides for the implementation of special education curriculum. Chapter 342, Standards for Special Education, Section 342.38, states that special education curriculum shall be adapted, whenever possible, from regular curricula. Accordingly, a school entity is required to provide planned courses for special education. It is necessary for the entity to determine the extent to which special education students shall be taught the curriculum of regular education or the curriculum designed for special education. It is on this curriculum determination that staffing decisions must be made.

Course structure and composition will vary within each school entity depending on the type of needs of the students to be served. Accordingly, staffing patterns also will vary. This CSPG is intended to assist the chief school officer in ensuring that all staff involved in instruction are appropriately certified and qualified for the courses they are teaching. The provisions of this CSPG and CSPG

No's. 80 and 80A establish parameters for special education and regular education certification and staffing. The state is prepared to provide the parameters in which staffing takes place; however, it is the responsibility of the chief school officer to exercise discretion in the selection and assignment of staff according to the particular curriculum needs of the students that staff serves.

Special Education and Regular Education Planned Courses

Of interest here are two general categories of certificates namely special education and regular education (elementary/secondary level subject areas). A person holding a certificate endorsed in one of the four special education areas is qualified to teach students with disabilities how to understand, overcome, compensate for and/or adjust to their disability through the use of adaptive instructional strategies, instructional accommodations, individualized learning activities and specially designed services. In addition, these persons are qualified to instruct in specific subject areas if the curriculum they teach is adjusted to the needs and abilities of identified students with disabilities and is different in learning objectives, content and instructional times, instructional methods and materials, expected levels of achievement or procedures for evaluation from those planned courses used to instruct regular education students of comparable chronological age.

Staffing Special Education Classes

When a student's IEP prescribes a regular education planned course, designed to satisfy the secondary education curriculum requirements prescribed in Chapter 5, a person teaching that course must be appropriately certified in the subject area. Special education certification is not appropriate in this instance. Conversely, when a student's IEP prescribes a special education planned course designed to satisfy the special education needs of the student, then the person teaching the course must be appropriately certified in the special education area.

LEA Responsibilities

The determination as to whether a regular education or special education planned course is appropriate rests with the school entity's officials. However, the IEP should clearly state the specific curriculum needs of the students. Without the IEP documentation and planned course differentiation, the state cannot support the local entity's choice of staffing in the event there are questions regarding the propriety of staffing. Therefore, it is critical that local school officials in staffing their regular education or special education programs, ensure that clearly defined and categorized planned courses are in place and that students' IEP's clearly prescribe curriculum needs.

Further Clarification of Roles

In addition to instructing special education students with IEP prescribed special education curriculum, the

following roles are also the responsibilities of special education certified teachers.

1. A person holding a certificate endorsed for Hearing Impaired, Deaf, Hard-of-Hearing, Hearing Handicapped, or Speech-Hearing Handicapped is qualified to render diagnostic, prescriptive and therapeutic services in instructional programs designed to serve handicapped students having hearing disorders.

2. A person holding a certificate endorsed for Visually Handicapped or Visually Impaired is qualified to render diagnostic, prescriptive and therapeutic services in instructional programs designed to serve students who are blind or partially sighted.

3. A person holding a certificate endorsed for Mentally Retarded, Physically Handicapped, Socially and Emotionally Disturbed, Emotionally Disturbed, or Mentally and/or Physically Handicapped is qualified to render diagnostic, prescriptive and therapeutic services in instructional programs designed to serve students having one or more of the following disabilities: mentally retarded, brain injured, physically handicapped, learning disabled, and socially and/or emotionally disturbed.

4. A person holding a certificate endorsed for Speech and Language Impaired, Speech Correctionist, Speech and Hearing Disorders, or Speech Correction is qualified to render diagnostic, prescriptive and therapeutic services in instructional programs designed to serve students having speech

and language disorders. A person so certified is qualified to assist subject area or special field teachers in rendering instructional accommodations and adaptive instructional strategies to students having speech and/or language disorders in conjunction with the subject area, or special field teacher's delivery of planned courses.

Letters of Authorization

5. Through school year 1975-76, some public school entities received written authorization from the Department of Education to assign persons certified in Elementary Education to teach pupils having learning difficulties and requiring remedial instruction in areas of the curriculum of the elementary schools. Such authorizing letters used the term "learning disabled classes" and, subsequently, some holders of these letters were assigned to teach special classes of students classified as learning disabled. Such departmental authorization was discontinued before the opening of school year 1976-77 and, except for incumbents holding these letters, certification for Mentally Retarded and/or the endorsement areas indicated in Section 4 above, has been considered the only qualification to teach learning disabled classes. A person holding a Letter of Authorization is qualified to continue in the assignment provided the following conditions exist:

   - Employed as a temporary professional or professional emp!oye[e] and not as a substitute.

- Was employed during School Year 1986-87 with an uninterrupted service record in the assignment.
- Otherwise lacks qualification and appropriate certification for the assignment.
- Has not been furloughed or placed on a recall list having previously held such assignment.

6. Within a Department of Education approved plan of Special Education providing for services rendered to students and while held in a detention home and centers and classified as special education, a person holding certification endorsed as indicated in Section 3 above is qualified to render diagnostic, prescriptive and therapeutic services in instructional programs designed for such students.

   A person holding a certificate endorsed for Social Restoration is qualified to provide these students the services attendant to the Social Restoration Certificate. (See CSPG No. 49)

7. A person holding a Supervisory Certificate endorsed for Special Education is qualified for assignment as a supervisor in that area of instruction. Additionally, the Supervisory Certificate endorsed for Special Education qualifies the holder to serve in any of the following assignments (as described in PDE Budgetary Controls for Special Education Programs):

   - "Director of Special Education"

– "Supervisor of Special Education"

8. A person holding a certificate endorsed for an area of Special Education and who is engaged in cooperative activity within a Special Education program also must hold certification for Cooperative Education to be qualified for such assignment. (See CSPG No. 59)

9. Since Special Education is an Instructional Certification area, school entities are encouraged to assign this responsibility to a Supervisor of Curriculum and Instruction rather than to a Supervisor of Pupil Personnel Services. (See CSPG No. 41)

   When the Supervisor of Pupil Personnel Services is assigned responsibility for a Special Education program, specifically developing special education curriculum and evaluating and supervising special education staff and instruction, the person must hold the Supervisor of Special Education Certificate also. (See CSPG No. 42)

10. The School Psychologist, Supervisor of School Psychological Services, or Supervisor of Pupil Personnel Services are within the Educational Specialist Certification areas who render support services to professionals in special education. Therefore, service as a certified School Psychologist will not satisfy the experience required for issuance of a Supervisor of Special Education certificate.

Definitions

Terms which must be understood in order to plan appropriately for the transition of the special education student from school to life, as listed in Special Education Planned Course Guidelines, PDE, February 1987, are provided as follows:

High School Diploma

Each eligible student who satisfactorily completes a special education program developed by an IEP team shall be granted and issued a regular high school diploma by the district of residence upon completion of that program if one of the following conditions prevails:

(1) The student is no longer of school age.

(2) Any time after age 18, if the principal certifies that the student's IEP has been completed in accordance with Chapter 342.

IEP (Individualized Education Program)

The IEP is an annual written plan defining the education that will be provided a specific student. Planned Courses serve as a resource for developing the elements of the IEP.

Special Education Planned Course

A course which is taught by a teacher with special education certification. The levels of intervention may be one of the following: Supportive intervention in the regular class, supplemental intervention in the regular classroom,

supplemental intervention in the resource classroom, part-time special education class in the regular school, full-time special education class in the regular school, full-time special education class outside of the regular school.

Regular Education Planned Course

A course which is taught by a teacher with certification in this specific subject. A Regular Education Planned Course is considered to be in the mainstream of the school's course offerings rather than in special education. The teacher adapts the Regular Education Planned Course to offset specific problems of students with disabilities and identifies instructional methods appropriate to the students.

THIS REVISION SUPERSEDES ALL EARLIER CSPG'S CARRYING THIS NUMBER AND/OR ADDRESSING THIS SUBJECT. PREVIOUS CSPG PRINTING DATES ON THIS SUBJECT: 10/76, 1/87, 1/89.